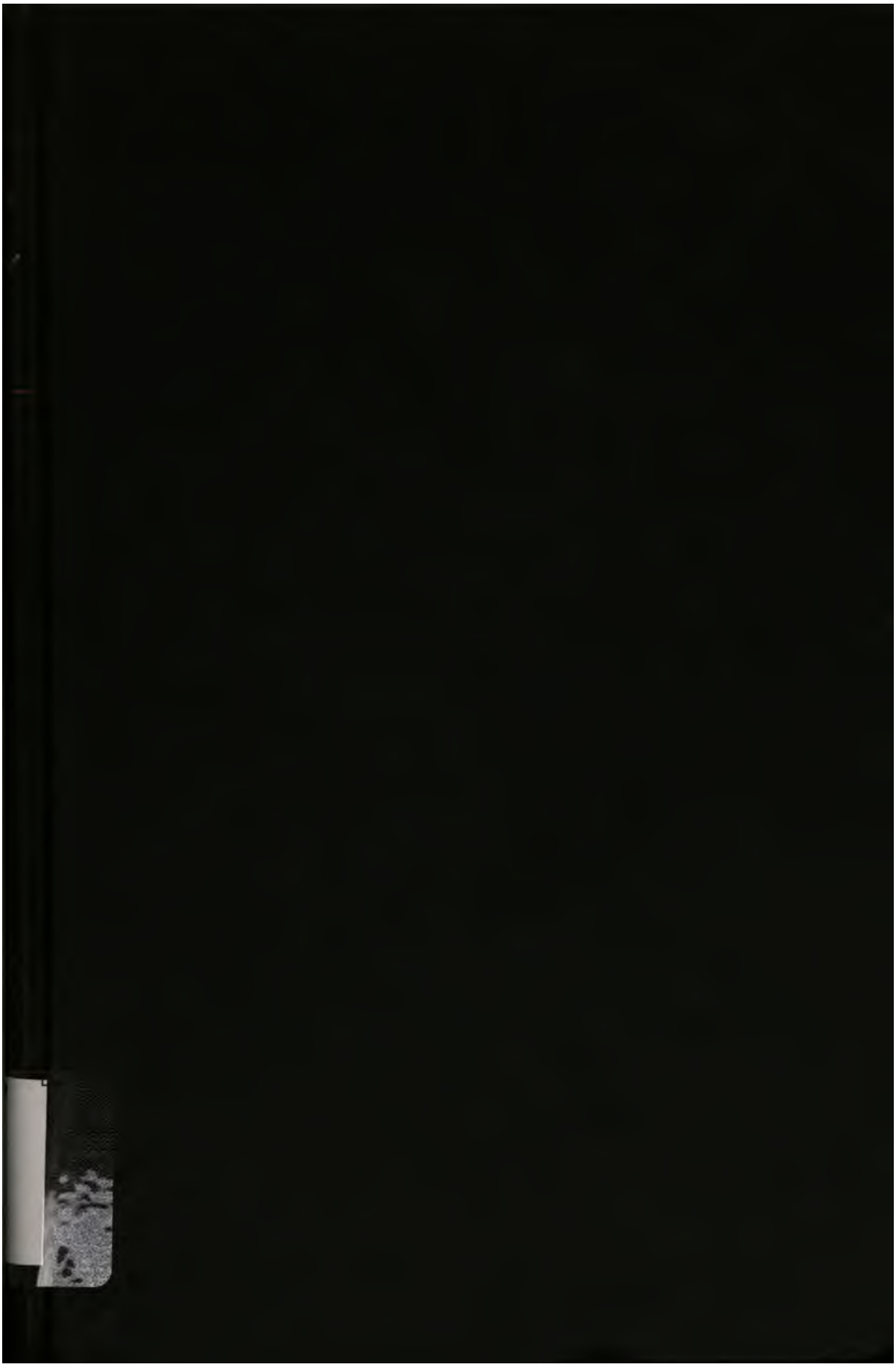

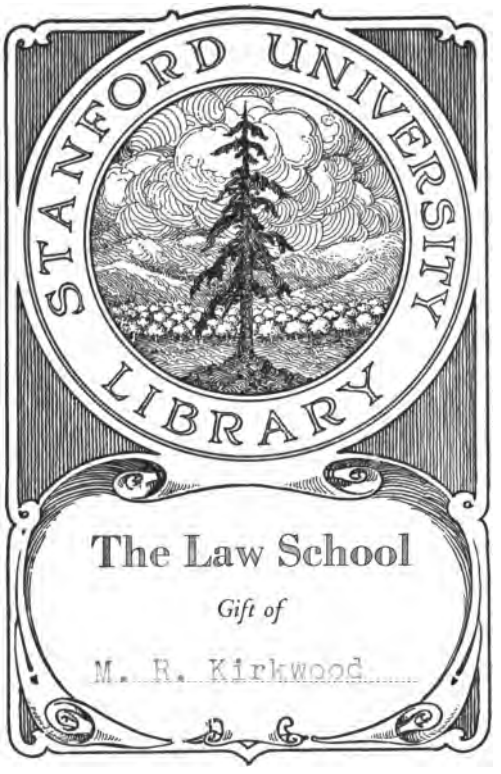
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CASES ON EQUITY

BY

GEORGE L. CLARK

Author of "Principles of Equity"

PART II—CHAPTER V.

1921

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COLUMBIA, MISSOURI

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CASES ON EQUITY

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CHAPTER V. TRUSTS

SECTION I. IN GENERAL—COMPARED WITH SIMILAR RELATIONS.

KELLOGG v. HALE[1].

(Supreme Court of Illinois, 1883, 108 Ill. 164.)

CRAIG, J. . . . The trust here was not in writing. The deed was absolute in terms, and purported to convey the title to Peck, but when the transaction is viewed in the light of the evidence, it appears that the property was conveyed to Peck in trust. He was to hold the title, lease the property, collect the rents, sell or reconvey, or make such disposition of the property as Kellogg might order. Was this such a trust as the Statute of Uses would execute? The answer to this question may be found in the former decisions of this court.

In Meacham v. Steele, 93 Ill. 146, where a question of this character was under consideration, it is said: "Where the conveyance imposes on the trustee active duties with respect to the trust estate, such as, to sell and convert into money, or to lease the same and collect the rents, issues and profits thereof, and pay them over to the beneficiary, it creates a trust which the statute does not execute." Here Peck, the trustee, had the entire charge of the property. It was his duty to rent, and collect the rents, pay the taxes, keep up the repairs, and in addition to this, upon request, sell and convey the property. The facts seem to bring the case directly within the rule announced in the case cited.

In Kirkland v. Cox, 94 Ill. 400, the effect of the Statute of Uses was under consideration, and it was held where an estate is conveyed to

[1] The statement of facts has usually been omitted. Where parts of the opinion have been omitted, such omission has been indicated thus: . . .

one person, for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. But this has reference only to passive simple or dry trusts. In such case the legal estate never vests in the feoffee, but is instantaneously transferred to the *cestui que use* as soon as the use is declared The facts surrounding the conveyance in this case do not bring the trust within what may be called a passive, simple or dry trust. The duties of the trustee had not been performed under the trust imposed by the deed and contract. Those duties were active, and so continued until the lands were conveyed, under the order and direction of Kellogg. Perry on Trusts, sec. 305, in speaking in regard to special or active trusts, says: "If any agency, duty or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents or to convey the estate, or if any control is to be exercised or duty performed by the trustee, . . . the operation of the statute is excluded, and the trusts or uses remain mere equitable estates." But the citation of other authorities on the question is useless. We are satisfied that the deed made to Peck passed the title to the property to him, unaffected by the Statute of Uses. . . .

YOUNG v. MERCANTILE TRUST CO.

(United States Circuit Court, 1905, 140 Fed. 61.)

HAZEL, D. J. The bill is for an accounting. . . .

Complainant's theory is that the defendant was depositary and trustee, and hence fiduciary relations existed between them intitling complainant to an accounting. The demurrant contends, on the other hand, that the transaction simply amounted to a naked deposit, by which the relations of bailor and bailee were established. A court of equity doubtless has plenary power to determine the rights and liabilities arising between a trustee and the beneficiaries of a trust. It is evident, however, that the general allegation of trust or trusteeship, together with the object and purpose of its creation, is not here distinctly or sufficiently averred. It is pertinent to inquire, what did the defendant undertake to do other than become depositary or

bailee? The character of the trust, its extent or purpose, and whether in writing or by parol, is not disclosed. The essential elements of a trust, viz., a beneficiary, a trustee other than the beneficiary, the subject-matter of the trust relations, and surrender of the property and transfer of the title to the trustee, are not well pleaded. The claim that the orator parted with his property to the United States Shipbuilding Company upon receiving the securities, and then deposited the same with the defendant under an implied arrangement that such securities were to be distributed as he might direct, in my judgment was not sufficient to establish such express or implied trust relations as would warrant the interposition of a court of equity. Certainly it would seem that specific and definite facts to warrant the interference of a trust relation should have been pleaded, instead of merely general averments. The suggestions that the demurrer concedes the allegations of the bill is not entirely correct, as such admissions only include relevant facts such as are well pleaded, and not conclusions of law. John D. Park and Sons Co. v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578. The transaction, as pleaded, has all the earmarks of a mere deposit, and not of a trust, in which the legal title has passed to the trustee, and where the cestui que trust has the beneficial enjoyment. United States v. Union Pacific Railroad Co., 98 U. S. 619, 25 L. Ed. 143. "The term 'trust'," says Chancellor Kent in Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417, "is a very comprehensive one. Every deposit is a direct trust. Every person who receives money to be paid to another, or to apply to a particular purpose, is a trustee. The cases of hirer and letter to hire, borrower and lender, pawner and pawnee, principal and agent, are all cases of express trust, etc. It has never been held, however, that these and the like cases are such technical trusts as to bring them within our limited equity jurisdiction." . . .

My conclusion is that such facts and circumstances as are essential to confer jurisdiction on this court are not pleaded. . . .

EVERETT v. DREW.

(Supreme Court of Massachusetts, 1880, 129 Mass. 150.)

MORTON, J. This is an action of contract, and the substantial allegations of the plaintiff's declaration are, that the defendant made an agreement with Elijah C. Drew that he was to buy a parcel of land, to take the deed in his own name, and to execute a declaration that he held it in trust for the defendants, to pay a part of the consideration with money furnished by the defendants, and to give his own note and mortgage back for the balance thereof. The declaration also alleges that Drew purchased land of the plaintiff's wife and other persons; that he paid therefor $10,000 with money furnished by the defendants; that the owners made a deed to him, and he, at their request, gave his note and a mortgage containing a power of sale to the plaintiff; that the plaintiff foreclosed said mortgage by a sale; that, after applying the proceeds of the sale, there remains a balance due on said note; and that the defendants owe the plaintiff the said balance and the interest thereon.

The plaintiff contends that Drew throughout the transaction and in giving the note acted as the agent of the defendants, and that, as the note is not a negotiable promissory note, he had the right to maintain an action on it against them as unknown and undisclosed principals.

The general rule is well established that if an agent, acting for his principal, makes a contract without disclosing his principal, the latter is bound by the contract. Thomson v. Davenport, 2 Smith Lead. Cas. (5th Am. ed.) 358, and cases cited. He is bound because it is his contract made through another person. But this rule does not apply in the case at bar. Drew was not the agent of the defendants. He was not authorized to, and did not in fact, make any contract for and on behalf of them. He bought the land and took the title, he gave the note and the mortgage, in his own name and for his own behalf as trustee. The relations between him and the defendants were not those of agent and principal, but of trustee and *cestui que trust*. Such a relation is lawful, and, in the absence

of fraud, does not render the *cestuis que trust* liable to suits at law upon contracts made by the trustee in his own name.

It is true that the declaration alleges that Drew was the agent of the defendants. But it also alleges the specific facts which show the relations between the parties, and those facts show that he was not an agent. The allegations that he was an agent must be regarded as mere allegations of a conclusion of law which are not sustained by the facts. The defendants' demurrer was therefore rightly sustained.

Exceptions overruled.

CHILES v. GARRISON.

(Supreme Court of Missouri, 1862, 32 Mo. 475.)

This was an action for money lent by the plaintiff to defendants. The answer denies the loan, and denies any indebtedness to plaintiff. At the date of the alleged loan the money was in special deposit with the defendants, and was afterward stolen from them. . . .

BAY, J. The only question presented by the record in this case is as to the propriety of the instruction given by the court. If the loan was complete before the robbery, then the loss fell upon the defendants; but if, under and by virtue of the terms of the contract, anything remained to be done to vest in the defendants the right to the money, then the loss was incurred by the plaintiff. We think no question can arise in regard to the delivery, for the money was already in the custody and possession of the defendants, having been previously left with them in special deposit.

The court refused all the instructions asked on both sides, and gave in lieu of them the following:

"If the jury find from the evidence that the plaintiff, by her agent, William G. Chiles, agreed with the defendant Garrison for and on behalf of the firm of Garrison & Hughes, to loan to them the sum of eight hundred dollars, and that Garrison agreed, on behalf of said firm, to borrow the same, and that the money was at the time on deposit with said firm, and that nothing remained to be done at any future time to complete the loan, the jury will find

for the plaintiff; but if it was only agreed that the money should be loaned, and it was further agreed that William G. Chiles, or some one else on the part of plaintiff, should go to defendants to obtain their note or count the money, or both, before the loan was to be complete, and that, before the giving a note or counting the money, the safe of defendants was robbed, without the fault of the defendants, or either of them, and the money stolen, they will find for the defendants."

Whether the loan was perfected or not before the robbery, was a question of fact, depending upon the terms of the contract as disclosed by the evidence in the cause, and the instruction very properly submitted it to the jury. . . .

Upon the whole, we think the instruction given covers the law of the case; and as the jury have passed upon the facts, we see no good reason to disturb their verdict.

With the concurrence of the other judges, the judgment of the court below will be affirmed.

WRIGHT v. PAYNE.

(Supreme Court of Alabama, 1878, 62 Ala. 340.)

The appellant, William H. Wright, brought this action, on the 17th day of November, 1874, against the appellee, Benjamin F. Paine, as the administrator de bonis non of the estate of William O. Winston, deceased, and sought to recover on the following receipts, to-wit:

"Deposited with me, for safe keeping, by William H. Wright, eight hundred and five dollars ($805) in gold, which I am to return whenever called for, this 4th day of November, 1857.

(Signed) WM. O. WINSTON."

Upon this receipt was the following indorsements:

"Presented for settlement, April 20th, 1872.

J. N. WINSTON,
Administrator of estate of Wm. O. Winston."

The second receipt is as follows:

"Received, January 25, 1858, of Wm. H. Wright, forty dollars in gold, on deposit, to be paid him on demand ($40.).

(Signed) W. O. WINSTON,
Per J. N. WINSTON."

This receipt was also presented to the administrator on the 20th of April, 1872.

The original complaint contained no averment of demand, but simply charged that the money due on receipts was still unpaid. An amendment, averring a demand on Winston in his lifetime, was subsequently made. . . .

BRICKELL, C. J. "In the ordinary cases of deposits of money with banking corporations, or bankers, the transaction amounts to a mere loan or mutuum, or irregular deposit, and the bank is to restore, not the same money, but an equivalent sum, whenever it is demanded."—Story on Bailments, § 80; Wray v. Tuskegee Ins. Co., 34 Ala. 58. It is insisted for the appellant, there is a distinction between a deposit with banks or bankers, and with an individual not engaged in banking. While a deposit with the one, not expressed, or shown by circumstances to have been a special deposit, will from the nature and character of the business of the depositary, and its usual course, be regarded as general, creating the relation of debtor and creditor—a deposit with the other will be presumed, in the absence of evidence to the contrary, as special, creating only the relation of bailor and bailee. The authority which is relied on to support the proposition, does not seem to assert it so broadly. The evidence of the deposit in that case, and of the agreement between the parties, was verbal, and it was shown that they stood in the relation of employer and overseer, the latter depositing bank notes with the former for safe-keeping. The relation of the parties, the expressed purpose of the deposit, the fact that the depositary was not engaged in any commercial business, were circumstances which the court held were proper for the consideration of the jury, in determining whether the deposit was general or special. Duncan v. Magette, 25 Tex. 246. Beyond this we do not understand the decision to extend, and to this extent it is consistent with our own case of Derrick v. Baker, 9 Port. 362. But neither case asserts that the character of business in which the depositary may be engaged, necessarily determines the character of the deposit.

Contracts, verbal or written, are interpreted in the light of the circumstances surrounding the parties, and their relations to each other when they are formed. These circumstances and relations, often aid materially in ascertaining the intention of the parties, and when the character of the contract is uncertain, when its expressions are inapt, may enable the court more satisfactorily to determine what are the obligations it imposes or the rights it confers. If there was nothing more in a transaction resting entirely in parol, than that a farmer, having money, should deposit with a neighbor engaged in the like and no other pursuit, or in no business requiring the frequent use of money, and the deposit was expressed to be for safe-keeping, the jury within whose province it would lie to determine whether the deposit was general or special, would probably conclude that it was special, that the purpose of the depositor was the safe-keeping of the money, and the duty and liability of the depositary was to keep safely. But if the depositary was a merchant, whose business required the frequent use of money, and he was in the habit of receiving money on deposit, there would be more hesitation in pronouncing the deposit special—that the depositary could not use the money—that the title to it remained in the depositor, and if it was lost, he must bear the loss, unless fraud or gross negligence could be imputed to the depositary.

The transaction between these parties does not rest in parol—the contracts are in writing, and if the circumstances under which they were made, the relations then existing between the parties, or any other extrinsic fact which could properly be considered, would aid in determining the character of the contracts, no evidence has been given of them. The construction they must bear, depends wholly on the terms in which they are expressed.

The first in point of time, expresses a deposit of a certain sum in gold, and that the purpose is for safe keeping, and that it is to be returned whenever called for. The gold is not shown to have been in a sealed package, in a bag, or in a box or chest, nor marked so as to be capable of being separated from other like coin, and of identification, nor is the character or denomination of the coin stated. The promise is unconditional, to return it whenever called for—there is no contingency provided by the contract, in which obedience to this promise can be excused. If the transaction was with a bank, banker, or a dealer in money, or with a merchant, or other person engaged

in business requiring the frequent use of money, and in the habit of receiving money on deposit, the presumption would be, probably, that the writing implied a general, not a special deposit. Such a deposit would be most advantageous to the depositor—the gold would cease to be his property, and if lost by any casualty, whatever may have been the diligence of the depositary, the obligation to repay it in kind would be absolute. The presumption would also be consistent with the course and usages of business.—Dawson v. Real Estate Bank, 5 Pike (Ark.), 297; Foster v. Essex Bank, 17 Mass. 479 (9 Am. Dec. 168); Commercial Bank v. Hughes, 17 Wend. 94. The writing expressing that the purpose of the deposit was safe keeping, would scarcely be sufficient to repel the presumption. But we are without the aid of evidence of the character of the business in which the depositary was engaged, or of any extrinsic fact which would aid in the construction of the writing. Every clause and word of a contract, must have assigned to it some meaning if possible and it is not to be presumed parties have deliberately or carelessly employed idle, unnecessary, or unmeaning words and expressions. Construing the instrument by its words alone, we conclude that the safe keeping of the gold was the purpose of the deposit, and the duty imposed was safely to keep, and to return in individuo when demanded. The deposit was therefore special, not general.

The other writing is in form of a receipt, and expresses the gold is payable on demand. The only duty imposed is the payment on demand. There is not, as in the former writing, an express agreement to keep safely, nor any words which are inconsistent with a loan, payable on request. That the money is stated to be received on deposit, was, most probably, intended to indicate that it was not a loan bearing interest. Giving due significance to all the words of the writing, and that its terms import a payment, not a return of the identical money, the contract is not a bailment, but a loan of money, payable presently or on request—a written promise for the payment of a certain sum of money, absolutely and unconditionally, imposing no other duty or obligation than payment, is a promissory note.—Woodfolk v. Leslie, 2 Nott & Mc. 585. A promissory note, or other writing for the payment of money on request, or presently, or on demand, is subject to the statute of limitations, and the bar of the statute is computed, not from the day of demand, but from the date of the note or writing.—Ang. Lim. § 95; Owen v. Henderson, 7 Ala.

641; McDonnell v. Br. Bank, 20 Ala. 313; Kimbro v. Waller, 21 Ala. 376. In all its material features, the writing we are construing is not distinguishable, in legal effect, from that which was considered in Owen v. Henderson, *supra,* and held from the day of its date, within the operation of the statute of limitations. Adhering to that decision, we must pronounce that the action, so far as founded on this instrument, was within the bar of the statute. The oral declarations made by Winston in 1869, if clearly proved, and if regarded as an unqualified admission of an existing liability, embracing the last instrument, which he was willing to pay, would not remove the bar of the statute, or prevent it from attaching subsequently. The bar of the statute can be avoided only by a partial payment before the bar is complete, or an unconditional promise in writing.—Code of 1876, § 3240.

TINKHAM v. HEYWORTH.

(Supreme Court of Illinois, 1863, 31 Ill. 522.)

E. I. Tinkham & Co. were bankers in the city of Chicago, and in the usual course of their business as such, collected notes, bills, drafts, etc., for their customers. Heyworth, the appellee, who was doing business in the same city as a merchant, under the name of J. O. Heyworth & Co., was a customer of these bankers, and kept a deposit account with them, drawing his money out as occasion required. While this relation existed between the parties, Heyworth placed in the hands of the bankers a demand for $103.10 against one Tewksbury, for collection.

The bankers collected the amount from Tewksbury, and placed it to the credit of Heyworth; under his firm name of J. O. Heyworth & Co.

The bank deposit book of Tinkham & Co. showed an account between the parties, which was balanced January 11, 1861, and there was entered as the last item, "March 13, 1861, Dr. to coll. G. D. Tewksbury, 103.10."

On the 11th February, 1862, Heyworth made demand of the amount so collected for him by Tinkham & Co., and they refused to pay it over.

It was the general and universal custom in Chicago for bankers to pass all collections for customers to their credit, like any other deposit, and this was so in the case of a single collection for a party not previously a customer or depositor.

On this state of facts, Heyworth, on the 20th of February, 1862, commenced an action of "trespass on the case" in the court below, against Tinkham & Co., to recover the amount collected by them upon the demand which he had placed in their hands against Tewksbury. Such proceedings were had in that suit, that the plaintiff recovered a judgment against the defendants, from which they took this appeal.

The assignment of errors presents the question, whether an action on the case will lie against bankers who fail to pay over money which they have collected for others. . . .

CATON, C. J. Were this action against an attorney for not paying over money collected, we should not hesitate to hold that case would lie. We think it is different in the case of a bank. Different duties and different rights arise in the two cases. The bank receives no fee for its services, but only the use of the money until it shall be called for by the creditor, while the attorney is entitled to a direct reward, and has no right to use the money at all, but must pay it over to his client immediately, without demand. Money thus collected never becomes the attorney's money, he had no right to make himself the debtor of the client by crediting him with the amount, while the bank may place the money in its vaults as its own, and credit the customer with the amount, and thereby become the debtor of the customer, the same as in case of an ordinary depositor, and this, whether the customer keeps an ordinary account with the bank or not. Such is the universal custom with banks, and if we may not take notice of this custom, it was abundantly proved on this trial. When the money is thus credited by the bank, it assumes every responsibility for its safety, while this is not the case with an attorney. In many respects, the undertaking is very different in the two cases.

When this money was collected and placed to the credit of the plaintiff, the only relation between the parties was that of debtor and creditor, and the form of the action should have conformed to that relation. We think an action as for a tort would not lie.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

DAILY v. BUTCHERS' & DROVERS' BANK OF ST. LOUIS.

(Supreme Court of Missouri, 1874, 56 Mo. 94.)

VORIES, J. . . . There is no difficulty in reference to the facts in this case; all of the material facts stand admitted. The question is as to the law growing out of the facts admitted. The plaintiff being the owner of certain drafts drawn on certain persons in the States of Mississippi and Arkansas and being a customer of the defendant (a bank in St. Louis, Mo.), deposited these drafts with the defendant for collection. The defendant forwarded the drafts to the National Bank at Vicksburg, in the State of Mississippi, for collection. The drafts were indorsed by the cashier of defendant to the cashier of the National bank at Vicksburg, for collection for account of Butchers' and Drovers' Bank of St. Louis. The Vicksburg bank collected part of the drafts and shortly afterwards failed and became insolvent without ever paying or otherwise accounting to defendant for the money collected or the drafts uncollected. There is no pretense that the defndant had not used due diligence in selecting the Vicksburg bank as a collecting agent, it being solvent at the time the drafts were forwarded. After the Vicksburg bank became insolvent, the plaintiff demanded the money collected by the Vicksburg bank and the drafts uncollected, of the defendant. The defendant failed to pay the money or deliver the drafts, and the plaintiff commenced this action to recover the amount thereof.

The question is, is the defendant liable for the amount of these drafts in this action, or, in other words, was the Vicksburg bank the agent of the plaintiff for the collection of these drafts, or was it the agent of the defendant? This has for a long time been a vexed question in the commercial world, the decisions on the subject being conflicting both in England and in this country. In the State of New York, although the decisions on the subject have not always been entirely consistent, it is now well settled that, where a bank in that State receives for collection a draft payable in another State, and forwards the draft to a correspondent in the place where the draft is payable, the bank receiving the draft for collection is

responsible to the owner; that such correspondent is the agent of the bank transmitting the draft and not the sub-agent of the owner of the draft. (Allen v. Merchants' Bank, 22 Wend. 215; Commercial Bank v. Union Bank, 1 Kern., 203). And the same rule is adopted in the States of Ohio and Indiana, and perhaps in some other States. (Reeves v. The State of Ohio, 8 Ohio St. 465; American Express Co. v. Haire, 21st Ind. 4). . . .

In the States of Massachusetts, Pennsylvania, Connecticut, Illinois, and in several other States, the decisions are in direct conflict with those in New York and Ohio referred to. In the case of Bellemire v. Bank of United States (4 Wharton, 105), it was held that the bank should be regarded as having undertaken to collect the note in the customary mode, and the holder of the note must be understood to have consented to the arrangement; consequently, on default of payment by the maker, it became the duty of the bank to call to its aid the notary and intrust him with the performance of that which was necessary to secure the responsibility of the indorsers; that the notary being a public officer, he and his sureties on his official bond were liable to the parties injured by his neglect or misconduct, and not the bank or person who directly employed him. . . .

These cases are not all exactly alike in reference to their particular facts, but the principle involved is deemed to be the same. They are governed by one general idea, which is, that it is the universal custom and habit for banks which receive notes and drafts for collection, the payer of which resides at a distance, to transmit the same to some bank or agency at the place of payment and that therefore, when the holder of a bill or draft in such case deposits the same with a bank for collection, without instructions to the contrary, he is presumed to do so with reference to such usage and to authorize the bank to transmit the bill or draft accordingly. And when the collecting bank uses due diligence and good faith in selecting a correspondent or bank at the place of payment, to whom the bill or draft is transmitted, it has discharged its whole duty, and this, notwithstanding the draft is indorsed to the agency to which it is transmitted, for collection on account of the collecting bank. Of course in such cases if the bank or other agent, to whom the draft was transmitted, should collect the draft and pay over the proceeds to the first bank or to its order without notice to the contrary from the real owner, the bank to which

it was transmitted would be discharged from further liability, and the first bank with which the bill was deposited would be liable to the owner for the proceeds. . . .

The judgment of the Circuit Court will be affirmed. The other judges concur.

SIMPSON v. WALDBY.

(Supreme Court of Michigan, 1886, 63 Mich. 439.)

MORSE, J. . . . From a careful perusal of the entire charge it does not appear that the jury were instructed upon the precise theory of the plaintiff's claim. He claims that he had nothing to do with the selection of the St. Albans Bank as a medium through which to collect the drafts upon Rixford; that such bank was chosen by the defendants, and was their agent, not his, and it was contended, under his evidence of the transaction, that the defendants were responsible for the loss of the money occasioned by the failure of the St. Albans Bank.

It will be seen that the circuit judge charged the jury what the law would be, in the absence of any agreement, if Simpson requested the drafts to be sent to the St. Albans Bank, but is silent as to what would be the result if the defendants themselves selected this bank, without any agreement as to who should bear the loss, if any.

The counsel for the defendants contend here, as they did below, that in the case of collections, like this, where there is no special agreement, the home bank is only responsible for the use of ordinary care and prudence in the selection of the agencies through which it attempts the collection. This is undoubtedly the purport and meaning of the instructions of the court below, taken as a whole, to the jury.

The question is therefore directly before us, what is the law of the case when a person steps into a bank, in the ordinary course of business dealing, and intrusts to it the collection of a draft drawn upon some person residing at a distance, in case the home bank, through the failure or dishonesty of another bank, selected by itself, never received the money upon such draft, though the same is paid by the drawee?

In the absence of any agreement in regard to the matter, who must bear the loss, in case the home bank has not been at fault in the selection of its agent or agents?

There is a conflict of authority upon this proposition; and, as it has never been settled in this State, we must be guided and governed in our action by what seems to us the most correct view in justice and on principle.

Is is held in New York, Indiana, Ohio, and New Jersey that the home bank must be the loser, upon the principle that such bank undertakes the collection of the draft or bill, and selects its agent or agents, and must be responsible for their default or neglect, as it would be for the default or neglect of its officers or clerks in the collection of a house bill, or as a contractor would be bound to answer for any negligence or default of his subcontractors or workmen in the performance of his contract. Allen v. Merchants' Bank of New York, 22 Wend. 215; Reeves v. State Bank of Ohio, 8 Ohio St. 465; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588; Ayrault v. Pacific Bank, 47 N. Y. 570; Abbott v. Smith, 4 Ind. 452; Tyson v. State Bank, 6 Blackf. 225.

In other states it is adjudged that the customer depositing the draft for collection must be presumed to know, and contract upon the knowledge, that in the ordinary course of business the home bank must employ correspondents or agents abroad to make the collection and transmit the money collected. The holder or maker of the draft, having full notice of the usual course of business, must be held to assent thereto.

"He therefore authorizes the bank with which he deals to do the work of collection through another bank." "The bank receiving the paper becomes an agent of the depositor, with authority to employ another bank to collect it. This second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such agent to make the collection."

If, therefore, there is no want of ordinary care and prudence in the selection of the subagent, and no negligence or fault on the part of the home bank, the customer must be the loser for the default or negligence of such subagent who is regarded as his agent. Guelich v. National St. Bank of Burlington, 56 Iowa, 434. . . .

Nearly all the cases cited above, in support of both sides of the question, relate to transactions by which the draft or bill failed of

collection by neglect of the notary to make demand in time, or proper protest, or default of the agent in not moving quick enough to make the money.

In the case at bar the draft was collected of the drawee, and the loss of the money resulted from the failure of the St. Albans Bank, before the collection of its draft transmitting such money to defendants. If defendants were negligent or in fault in not immediately forwarding such draft to New York, upon its reception by them, or in its presentation there, they are, in my opinion, liable to plaintiff for the money; but, if there was no negligence in either of these respects, the question arises, who must bear the loss on account of the inability of the St. Albans Bank to meet its draft transmitting the money? . .

In Mackersy v. Ramsays (in the house of lords), 9 Clark & F. 818, the same doctrine is maintained. Mackersy employed bankers in Edinburgh to obtain for him payment of a bill drawn upon a person in Calcutta. The bankers accepted the employment, and wrote him, promising to credit him with the money when received. They transmitted the bill, in the usual course of business, to bankers in London, and by them it was forwarded to India, where it was duly paid. The bank in India that collected the money failed, and the Edinburgh bankers did not receive it. They, however, wrote to the drawer of the bill, announcing the fact of its payment, but never actually credited him with the amount thereof on their books. Held, that the Edinburgh bankers were the agents of the drawer to obtain payment of the bill; that, payment having been actually made, they became *ipso facto* liable to him for the amount received, and that he could not be called upon to suffer any loss occasioned by the conduct of their subagents, between whom and himself there existed no privity. . .

The learned jurists holding otherwise all admit that, if a person intrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers, or employees. I cannot see why any different rule should prevail in the collection of a foreign bill. It is in every case that I have examined sought to be maintained upon the theory that the customer knows the bank must act through some other person or persons at a distance, and therefore, impliedly, from the very nature of the course of business, assents to the employment of such persons, and makes them his agents. This reasoning does not strike me as

sound. If I leave an indorsed note against persons in my own town for collection, and consequent demand and protest, I know that some agent or employee of the bank will do the work, or some part of it, and I do not know or inquire who will do it. I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. The law authorizes me to do this.

If I intrust the same bank with the collection of a foreign draft, I also know that they will employ some agent or correspondent abroad, of their selection, not mine, of whom I know nothing, and with whom they are supposed to have business relations. I do not inquire whom they are to select. I presume, and have a right to presume, that they have business knowledge of such agent or agents, which I do not and cannot possess, by the very course of their dealings as bankers.

In each case the bank holds itself out, for a consideration, to collect my paper, and it can make no difference whether the compensation is great or small. In each case it selects its own agents in the premises. In each case I have no part in or control over such selection. In each case there is no privity between the party selected and myself. . . .

It has been said by some of the courts that the holding of banks liable for the default and neglect of their correspondents in a case like the present would render the collection of bills and drafts of this nature extremely difficult, and that it would tend very much to destroy the facilities which at present exist, and subject the holders of bills to inconvenience and expense, and probably, in many cases, to serious loss.

But as long as banks and bankers or other persons hold themselves out to collect such bills or drafts for a compensation, or their advantage, they ought to be governed by the same rules of law that apply to other persons, and, if they wish to avoid such responsibility, it is very easy for them to accept such business only upon a special agreement as to their duties and liabilities. Failing to do this, I think they must, in taking such bills or drafts, be responsible, as other business men are, for the misconduct of their selected agents at home or abroad. . . .

ZEIDEMAN v. MOLASKY.

(Missouri Court of Appeals, 1906, 118 Mo. App. 106, 94 S. W. 754.)

NORTONI, J. The action is for money had and received. . . .

It therefore appears from the petition that respondent is trustee of an express trust in so far as appellant's earnings and their increments arising out of the several periods of employment since her majority, are concerned. Now this action is for money had and received and such form of action is a proper remedy by the *cestui que trust* against the trustee of an express trust only when the trust is fully executed and the amount settled and there is nothing to do but for the trustee to pay over the amount to the *cestui que trust.* An action at law for money had and received will not lie when the trust is still open, nor until the final account is settled and a balance ascertained. (Case v. Roberts, 1 Holt's N. P. C. 501; 2 Perry on Trusts (5 Ed.), sec. 843; 22 Amer. and Eng. Ency. Pl. and Pr. (2 ed.), 137-138; Frost v. Redford, 54 Mo. App. 345.) From the allegations of the petition relative to the relations between the parties other than those arising out of the alleged guardianship, it appears that there has been no settlement or ascertainment of the alleged account; in fact, it appears that the funds alleged to be the subject of the trust are in no manner ascertained. Such funds arise out of a contract of hire in which the compensation was not even agreed upon. No prior contract is shown whereby any certain amount is to be allowed appellant as her compensation and invested for her benefit, and in truth, it affirmatively appears that no settlement or ascertainment of the alleged trust account has ever been had between the parties. Wherefore, it is plain that the action for money had and received will not lie, under the circumstances stated, for the amount that may be due appellant by virtue of the several employments, her wages and increments since her majority, the remedy being by bill in equity to obtain an accounting therefor. . . .

DOYLE v. MURPHY.

(Supreme Court of Illinois, 1859, 22 Ill. 502.)

WALKER, J. . . . By the defendants in error, it is insisted that Maurice Doyle was a trustee, and being such, a court of equity has undoubted jurisdiction over the trust fund. That the court has such a jurisdiction in cases of strict trust, there is no doubt. But it does not therefore follow, that the court will assume jurisdiction in every case where a mere confidence has been reposed, or a credit given. The various affairs of life in almost every act between individuals in trade and commerce, involve the reposing of confidence or trust in each other, and yet it never has been supposed that because such a confidence or trust in the integrity of another has been extended and abused, that therefore, a court of equity would in all such cases assume jurisdiction. When one person sells property on credit, or loans money to another, confidence is reposed and a trust is entertained that the money will be paid by the debtor, and yet no case has gone so far as to hold, that it was such a trust, as gave to a court of equity jurisdiction under the head of trusts. If this were so, there would be no case where property or money was obtained on a credit, in which the court would not have jurisdiction. But on the other hand, when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust is thereby created, as authorized the court of equity to entertain jurisdiction, to compel its application to the purposes of the trust. And the property may be pursued into the hands of all persons who have obtained it with notice of the trust, or where it has been converted into money, the money may be recovered, or where the money arising from the sale of trust property or funds, has been invested in other property, a court of equity will compel the trustee to account for the property thus acquired, and treat it in every respect as if it were the original trust property. In this case the bill alleges and one of the complainants swears, that money was delivered to Maurice Doyle to pay certain debts of Catherine Byrne, which he failed to so apply. If he failed to pay this money, there was such a breach of contract, as would have authorized

Catherine Byrne to maintain an action for money had and received, and probably the creditors to whom the money should have been paid might have maintained the action. But according to no rule or adjudged case that we are aware of, was it a trust fund, authorizing Mrs. Byrne or her representatives to recover as a trust fund. If it was a trust fund, it was such for the benefit of her creditors, and they would alone have had the right to pursue it in equity, and her representatives have no better or greater right than she held. . . .

McFADDEN v. JENKYNS.

(In Chancery, 1842, 1 Phillips 153.)

THE LORD CHANCELLOR. This was an appeal from a judgment of Vice Chancellor Wigram, upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these. The testator, Thomas Warry, had lent a sum of 500 pounds to the defendant Jenkyns, to be returned within a short period. Some time afterwards Warry sent a verbal direction to Jenkyns to hold the 500 pounds in trust for Mrs. McFadden. This he assented to, and, upon her application, paid her a small sum, 10 pounds, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of Thomas Warry. The executor had brought an action to recover the 500 pounds so lent to Jenkyns. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the Vice-Chancellor in this case, which are indeed free from doubt, and appear not to have been contested in this Court, viz. That a declaration by parol is sufficient to create a trust of personal property; and that if the testator Thomas Warry had, in his lifetime, declared himself a trustee of the debt for the Plaintiff, that, in equity, would perfect the gift to the plaintiff as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the

present. The testator, in directing Jenkyns to hold the money in trust for the Plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff.

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned Judge in the court below, and with the decision of the Master of the Rolls in the case to which he refers, I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application. . . .

PORTER v. JACKSON.

(Supreme Court of Indiana, 1883, 95 Ind. 210.)

ZOLLARS, J. The will of William Jackson was probated in 1869. By this will, the testator gave to his wife all of his property, real and personal so long as she should remain his widow. Upon her marriage or death the property was devised to his seven children, one-seventh to each. The will contained the following provision: "I further will that, as a condition of the acceptance of the property thus devised to my heirs, they, on their part, shall support and maintain Eliza Andrews, during her natural life, or until she shall marry." . . .

The will, as we have seen, provides that as a condition of the acceptance of the property devised, the devisees shall support and maintain Eliza Andrews. The rule is well settled that, where real estate is devised to the person who, by the will, is directed to pay a legacy, such legacy is an equitable charge upon the real estate so devised. Lindsey v. Lindsey, 45 Ind. 552; Wilson v. Piper, 77 Ind. 437; Cann v. Fidler, 62 Ind. 116; Wilson v. Moore, 86 Ind. 244; Castor v. Jones, 86 Ind. 289; Nash v. Taylor, 83 Ind. 347.

This is conceded by counsel in this case. It is further conceded, in argument, that as the will was probated and of record, and as Eliza

Andrews was not a party to the partition proceedings, the equitable charge for her support was not destroyed by the sale to appellant.

We think it equally clear that the acceptance of the property, under the will, imposed a personal obligation upon the devisees to furnish the support to the legatee, and that she may enforce that obligation by a suit, and recover a personal judgment. The acceptance of the property under the will implied a promise to furnish the support. That support seems to have been the consideration for the property devised. It is expressly made the condition to the vesting of the title to the property. It seems to be plain that the testator intended to impose a personal charge upon the devisees.

In the case of Harris v. Fly, 7 Paige, 421, which arose under a will similar to that under consideration, Chancellor Walworth, in speaking of the legacy, and the liability of the devisee said: "By the will, the payment thereof is charged upon him personally; and he has received the land as an equivalent for the payment thereof, although for the protection of the rights of the legatees, this court gives them an equitable lien upon the land itself as an additional security. This case was cited and approved by this court in the case of Lindsey v. Lindsey, supra. The same doctrine was held in the case of Cann v. Fidler, supra. . . .

Under the provisions of the will, and in the light of the above authorities, we think it is very clear that the devisees are personally bound to furnish to Eliza Andrews the support provided in the will, and that she may enforce that liability by suit, even beyond the value of the land devised if necessary, and without resorting to the land at all, if the amount can be made by such suit or suits. Whether the devisees could compel her to thus resort to their personal liability before having resort to the land, if they still own it, we need not decide.

We think it clear also that the charge upon the land remains an equitable charge upon the fund in the hands of the commissioner and in the custody of the court, and that she may enforce that charge. Especially is this so, as the devisees are liable beyond the value of the land, and are insolvent. She may enforce the personal liability against the devisees, and still look to the land if necessary. See analogous cases, Gimbel v. Stolte, 59 Ind. 446; Clyde v. Simpson, 4 Ohio St. 445; Milligan v. Poole, 35 Ind. 64; Harris v. Fly, *supra.*

WHITEHOUSE v. CARGILL.

(Supreme Court of Maine, 1896, 88 Me. 479, 34 Atl. 276.)

FOSTER, J. The father of the plaintiff devised certain real estate to his son, and in his will directed that the son pay to the plaintiff five hundred dollars when she should become twenty-one years of age.

The father died November 10, 1871, and his will was duly admitted to probate.

The defendant was appointed guardian of the plaintiff in 1873, and continued to be her legal guardian till she arrived at the age of twenty-one years in 1890.

On October 2d 1876, the son conveyed by warranty deed the real estate to this defendant.

This real estate, upon a former bill in equity, brought by the plaintiff against the defendant, was charged with the payment of said legacy (Whitehouse v. Cargill, 86 Maine, 60), and by a decree of the court was sold by the master and the proceeds, amounting to $143, was paid to the plaintiff.

After the termination of defendant's guardianship he procured an insurance of five hundred dollars on the store which was a part of the real estate conveyed to him by his warranty deed from the testator's son. The store was burned and defendant collected the insurance.

The present case raises two questions: (1) Is the defendant accountable to the plaintiff for the insurance which he procured in his own name, and has collected? (2) Is he accountable to the plaintiff for the rents and profits of the real estate prior to the sale by the master?

Both questions we think must be answered in the negative.

When the real estate was sold by the master and the proceeds paid to the plaintiff, her remedy against this defendant was exhausted, unless there might be a remedy upon the guardian's bond.

The nature of the plaintiff's claim upon the real estate was a lien thereon for the payment of her legacy, enforceable in equity. Merritt

v. Bucknam, 77 Maine 253; Same v. Same, 78 Maine, 504; Taft v. Morse, 4 Met. 523; Thayer v. Finnegan, 134 Mass. 62.

The contract of insurance is one of indemnity only. The defendant had an insurable interest, and could recover only to the extent of his loss. The contract of insurance does not run with the land, and is an agreement to indemnify the assured against any loss which he may sustain, and not any loss incurred by another having an interest as mortgager, redemptioner, attaching creditor or otherwise. Cushing v. Thompson, 34 Maine, 496; White v. Brown, 2 Cush. 412; Donnell v. Donnell, 86 Maine, 518.

There was no privity of contract in fact or law between the plaintiff and the defendant by which this insurance, placed by the defendant at his own expense and upon his interest, should be held under the lien that existed upon the real estate. Donnell v. Donnell, supra; McIntire v. Plaisted, 68 Maine, 363; Cushing v. Thompson, 34 Maine 496; White v. Brown, supra.

The plaintiff had an equitable lien upon the estate, a charge upon it rather than any title to or legal estate in it. Taft v. Morse, 4 Met. 523; Merritt v. Bucknam, 78 Maine, 504, 507; Bailey v. Ekins, 7 Ves. 323; Gardner v. Gardner, 3 Mason, 178.

The holder of an equitable lien, with no legal estate, cannot call the owner of the legal estate to account for the rents and profits received by him while occupying the premises.

Bill dismissed.

CHAPMAN v. SHATTUCK.

(Supreme Court of Illinois, 1846, 8 Ill. 49.)

TREAT, J. This was an action of debt commenced by Chapman against Shattuck. The declaration was on an appeal bond in the penalty of seventy-one dollars. At the return term, Shattuck moved to dismiss the case and filed a stipulation signed by him and Chapman, stating that the suit had been settled, and agreeing that it should be dismissed at the cost of Shattuck. The motion was resisted by W. T. Burgess, Esq., the plaintiff's attorney. He read an affidavit, alleging in substance that it had been agreed between him and his client that

a balance of seven dollars, due him for services as attorney in this and a former case, should be paid out of the proceeds of the judgment to be recovered in this suit. That before the date of the stipulation to dismiss, he notified Shattuck of the agreement between him and his client; and that the settlement was made without his knowledge or consent. The circuit court dismissed the case according to the terms of the stipulation. That decision is now assigned for error.

It is insisted that Burgess had such an interest in the subject-matter of the suit, as to preclude the parties from compromising it without providing for the payment of the amount due him. If this position sion (?) can be sustained, it must be on the ground that he was the equitable assignee of the chose in action, on which the suit was instituted. The doctrine is now well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good at law, or in equity only. If valid in equity only, the assignee is permitted to sue in the name of the person having the legal interest, and to control the proceedings. The former owner is not allowed to interfere with the prosecution, except so far as may be necessary to protect himself against the payment of costs. After the debtor has knowledge of the assignment, he is inhibited from doing any act which may prejudice the rights of the assignee. Payment by him to the nominal creditor, after notice of the assignment, will be no defence to an action brought for the benefit of the assignee. Any compromise or adjustment of the cause of action by the original parties, made after notice of the assignment, and without the consent of the assignee, will be void as against him. Andrews v. Becker, 1 Johns. cases, 411; Littlefield v. Story 3 Johns, 426; Raymond v. Squire, 11 do. 47; Anderson v. Van Allen, 12 do. 343; Jones v. Withe, 13 Mass. 304; Welch v. Mandeville, 1 Wheaton, 233; McCullom v. Coxe, 1 Dallas, 134. A partial assignment, however, of the chose in action, will not suffice to bring the case within the principle. The whole cause of action must be assigned. It was well remarked by Justice Story, in Mandeville v. Welch, 5 Wheaton, 277, that "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into payments. When he undertakes to

pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. In the case before us, it is not pretended that there was an assignment of the entire cause of action. By the terms of the agreement, Burgess was only to receive a portion of the proceeds of the bond. This gave him no power over the suit. Chapman had not so parted with his interest in the bond as to lose his right to control it. Shattuck was not bound to notice the claim of Burgess. The parties to the record were at full liberty to compromise the case, and having done so, the circuit court did right in carrying their stipulation into effect. The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

STONE v. PRATT.

(Supreme Court of Illinois, 1860, 25 Ill. 16.)

CATON, C. J. On the 23rd of September, 1852, A. Pratt, by indenture, agreed to sell and convey to D'Wolf, or his assigns, several parcels of land for the gross sum of four thousand and fifty dollars, all on time except one hundred dollars; and D'Wolf, by the same instrument, agreed to pay the purchase money as therein stipulated.

On the 15th of January, 1853, Stone purchased of D'Wolf fifteen acres, part of the premises which Pratt had sold and agreed to convey to D'Wolf. . . .

Stone, insisting that by the purchase of the contract, he was entitled to recover the money due thereon in place of Pratt, and that Pratt was thereby in effect fully paid the purchase money for which he had agreed to convey the premises sold to D'Wolf, filed this bill to compell Pratt to convey to him the fifteen acres, which he had purchased of D'Wolf, parcel of that which D'Wolf had bought of Pratt. . . .

It is a well settled rule of law, that an entire contract cannot be divided so as to compel a party to perform it in parcels, either to different persons or at different times. When D'Wolf sold a part of the premises to Stone, he could not thereby impose the legal obligation upon Pratt to convey that portion to Stone, and the balance to him-

self. That would be making it in fact two contracts instead of one. It was asking him to make satisfaction to two instead of one. In case of disagreement it exposed him to two prosecutions instead of one, and required him to make two deeds instead of one. This is a hardship which the common law will never allow to be imposed upon a promisor or an obligor. Nor is this principle of the common law ignored by courts of equity, although in exceptional cases they will overlook it, where it is necessary to protect the rights of an innocent, fair and *bona fide* purchaser against a contemplated fraud. . . .

JAMES v. NEWTON.

(Supreme Court of Massachusetts, 1886, 142 Mass. 366, 8 N. E. 122.)

FIELD, J. The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due a contract for building a grammar school-house and it is agreed that and payable to me" from the city of Newton, under and by virtue of sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of $600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto*, unless it is accepted by the person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the city of Newton has not promised him that it will pay him $600. The $600 is expressly made payable "out of the money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignment of choses in action made without

the assent of the debtor, but for a long time they have recognized and enforced assignments of the whole of a debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. Warren v. Comings, 6 Cush. 103.

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment. The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants according to their rights, as between themselves; and the rule against partial assignments was established for the benefit of the debtor. Public Schools v. Heath, 2 McCarter, 22. Fourth National Bank v. Noonan, 14 Mo. App. 243.

In many jurisdictions, courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is

adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that this is no defence to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it.

It may be argued that, if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that, if this is so, it follows that, after notice of the assignment, the debtor cannot rightfully pay the sum assigned to the assignor. . . .

TYSON v. JACKSON

(In Chancery, 1861, 30 Beav. 384.)

THE MASTER OF THE ROLLS. I think the decree in this case is a matter of course. The testator died in 1832; he bequeathed five legacies of £200 each to his grandchildren, one of them being given to Mira Ella Clark. In 1858, she and her husband assigned it to the plaintiff, who now requires payment; and, if there is no bar by lapse of time, it would be a matter of course that that legacy should now be paid. It appears that Holmes alone proved the will, he got in all the assets, he passed his residuary account at the Stamp Office, and paid over the the residue, after deducting the duty, to the residuary legatee. If the case stood there, could the executor, apart from the question of time, afterwards dispute the right of legatee to receive the legacy? Could he require the legatee to take an account of the estate or to go against

the residuary legatee? It is clear, when an executor retains the money for payment of the legacy, that he becomes, as in the case of Phillipo v. Munnings, 2 Myl. & Cr. 309, a trustee of that particular fund or sum of money so retained distinct from his character of executor. It is as distinct as if the testator had directed his executor to pay the legacy over to A. B. in trust for a legatee, and it had been actually paid over; A. B. would then be a trustee for the legatee. So here, the executor who has retained that sum of money is in exactly the same situation.

But it does not end there, for in the residuary account which the executor passed in July, 1835, he actually signed a document, stating that he had "retained in trust, on the 23rd day of June, 1835, the sum £1,000 for the five legatees (mentioning them) being the five legacies out of the personal estate above mentioned, having first allowed or paid £10 for the duty thereof." I should be overruling Phillipo v. Munnings and all similar cases, if I held, that after signing this document stating that he was a trustee, and after paying over the balance to the residuary legatee, the executor was not a trustee for these legatees.

But the case does not even end there, for the executor pays the interest upon the legacy down to his death in November, 1840, and the bill is filed in March, 1860, within twenty years. But, independently of this, there is a distinct and clear trust, which time will not bar, and upon which the Statute of Limitations has no effect at all.

SECTION II. ESSENTIALS TO THE CREATION AND EXISTENCE OF THE TRUST RELATION

ALDRICH v. ALDRICH.

(Supreme Court of Massachusetts, 1895, 172 Mass. 101, 51 N. E. 449.)

The bill alleged that the testator died on March 14, 1895, leaving a will by which he gave "all the rest and residue of my estate, after the payment of debts," to his wife. After appointing her executrix, and

requesting that she be exempt from giving sureties on her bond and be not required to file any schedule of property in the Probate Court, he proceeded, "I give all my estate to my said wife to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to do during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives." . . .

MORTON, J. If the testator had intended to create a trust in favor of his children at his wife's death, there can be no doubt that he knew how to do it in clear and unmistakable terms, and it is almost inconceivable that, if such was his purpose, he should have expressed himself in the manner in which he has done.

There is no doubt that words of recommendation, or of confidence, entreaty, hope, or desire, have been held sufficient under some circumstances to create a trust. But, speaking generally, this was because in such cases such a construction was supposed to carry out the intention of the testator. If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it. Hess v. Singler, 114 Mass. 56. Lambe v. Eames, L. R. 10 Eq. 267; S. C. 6 Ch. App. 597.

In the present case there is what clearly would constitute in law, if it stood alone, an absolute gift of the estate to the wife. Then follows, after one or two intervening clauses, the one on which the plaintiff relies. This was intended by the testator, it seems to us, to express his reason for the gift to his wife and his confidence in her, and not to cut down or affect the absolute character of the gift which he had previously made to her. It is true that he says in substance that he expects that the property, when she shall not longer need it, will be divided equally between the children and their representatives. But there is nothing which renders it obligatory on her to do this, and therefore one of the features of a precatory trust is wanting. See Warner v. Bates, 98 Mass. 274; Spooner v. Lovejoy, 108 Mass. 529; Hess v. Singler, 114 Mass. 56. . . .

The cases which we have cited do not resemble in all respects the one at bar, and there are English and American cases which seem to

support the view for which the plaintiff contends. But the question is, whether, taking the will as a whole, it was the intention of the testator to create a trust, and we are of opinion that it was not, and that the construction which we have adopted is in harmony with the more recent English and American cases.

Bill dismissed.

LEEPER v. TAYLOR.

(Supreme Court of Missouri, 1892, 111 Mo. 312, 19 S. W. 955.)

BLACK, J. . . . The defendant's answer admits the execution of the declaration of trust, and it proceeds upon the theory that the instrument was duly delivered to Mr. Lipscomb for the defendant's father and mother. It is useless to discuss the question of the execution and delivery of the instrument, for both are admitted by the answer.

The point is made, however that it is void for want of consideration. It may be conceded that a court of equity will not enforce an executory agreement based upon a voluntary consideration. But a settler possessed of a legal title may create a valid trust therein by a declaration that he holds the title in trust for the other person. A transfer of the title is not necessary. Bispham on Equity [4 Ed.] sec. 67. Here the trust was duly declared by an instrument in writing and under seal. It is a perfect, complete trust; and such a trust will be enforced, notwithstanding the consideration is voluntary. Lane v. Ewing, 31 Mo. 75. If a trust has been completely declared, the absence of a valuable consideration is immaterial. A perfect or complete trust is valid and enforceable, although purely voluntary. Pomeroy on Equity Jurisprudence [2 Ed.] secs. 996, 997. As this trust is perfect and complete, it must be enforced, though voluntary. But it recites a valuable consideration, and the circumstances show clearly enough that it was executed in consideration of the absolute deed of the premises previously made by the beneficiaries. But, be this as it may, the trust is perfect, and must be enforced, though based upon a voluntary consideration only. . . .

BADGLEY v. VOTRAIN.

(Supreme Court of Illinois, 1873, 68 Ill. 25.)

This was a bill in equity exhibited in the St. Clair circuit court by August Votrain, a grandson of Etienne Deshayes, deceased, who died intestate, leaving complainant and eight other grandchildren his only heirs at law. These other eight grandchildren, together with the administrator of the intestate's estate, were made parties defendant. The bill was founded upon and sought to enforce the provisions of the following instrument in writing:

"Know all men by these presents, that I have assigned to August Votrain the sum of $12,000 of my property, which amount he is to draw before my property is divided; and he is to inherit one-third of the rest of my property, which is to be divided into three parts, after my death. The $12,000 which I have assigned to him consists of $9800 mortgages and $2200 in notes, which I have assigned upon these conditions:

First—That I retain said assigned mortgages and notes, and receive the interest thereof during my life.

Secondly—That I promise to pay said August Votrain, yearly, $200, the first payment to be made January 1st, 1872, and $200 every year thereafter.

Thirdly—These foregoing conditions are expressly understood to be upon condition that, if the said August Votrain should die before my death, the amount of property so assigned shall revert to me and remain my property as if it had not been assigned to him, and this instrument of writing shall be null and void. Belleville, Ill., September 6th, 1871.

ETIENNE DESHAYES. (SEAL).
his
AUGUST X VOTRAIN. (SEAL).
mark

C. T. Elles, witness.

The bill alleges that, March 27, 1871, the intestate was the owner and payee of five several promissory notes for divers amounts, secured by mortgage; that for the purpose of making a gift or advancement

to complainant, intestate on that day executed on the back of these several notes and mortgages an assignment, as follows:

"For value received, I hereby assign, the within note with mortgage to August Votrain, this 27th day of March, 1871.

ETIENNE DESHAYES."

But there was no proof as to the nature of this transaction or its purpose.

These notes are described and designated in the bill as "Exhibit A." The bill also alleges that, September 6, 1871, intestate was likewise owner of five other promissory notes, payable to him, for divers amounts, which are designated as "Exhibit B;" these notes had no assignment upon them. Alleges that, at his death, intestate was the owner of other personal property of the value of $1000. Complainant claims, by his bill, that, under the instrument of September 6, 1871, he is entitled to have transferred to him notes and mortgages to the amount of $12,000, and one-third of the other property of intestate, and prays that the administrator be decreed to transfer and set apart the same. . . .

McALLISTER, J. This case is clearly distinguishable from that of Otis v. Beckwith, 49 Ill. 121, relied on by counsel for defendant in error. In that case the subject-matter of the settlement was a policy of insurance upon the life of the settler, which was not assignable at law. The instrument of assignment contained an express declaration of trust in favor of the donor's three sons. The donor, upon executing it, gave explicit notice of the fact of the assignment and its purpose to both the assignee and the insurance company. Whereupon the former made a formal acceptance of the trust, and the latter noted the assignment in their books, in accordance with their regulations in such cases. The donor had done everything in his power essential to the completion of the transaction. The delivery of the policy to the assignee was not essential. No further conveyance from the donor was requisite. The trust was perfectly created, and nothing was required of the court but to give it effect as an executed trust.

But the case in hand differs in essential particulars. Here, there is no declaration of trust, and we are satisfied, from a careful examination of the instrument of September 6, 1871, that the donor had no intention of thereby creating the relation of trustee and *cestui que trust* between himself and defendant in error in respect to any fund or choses in action. That instrument is wholly executory in its effect,

and, aside from the promise by the donor to pay defendants $200 annually, during the donor's life, it is wholly testamentary in its nature. So far as the provision is concerned, requiring $12,000 to be paid over to defendant out of the donor's estate after his death, and then, that defendant should take one-third of the residue, the instrument purports to be, and is, a mere testamentary disposition of the donor's estate, not executed in conformity with the Statute of Wills, and we would, therefore, be no more justified in inferring an intention on the donor's part to constitute himself trustee, during his life, of the property out of which the $12,000 were to be paid to defendant, than if, instead of this instrument, he had made a will containing the same provision. These propositions we regard as clear and incontrovertible.

If, then, there is the absence of an express declaration of trust and of an intention to create one on the part of the donor in favor of defendant, what is the precise nature of the relief sought by defendant, in bringing his bill in the court below? It was to obtain the assistance of a court of equity to constitute him *cestui que trust* upon this voluntary instrument.

In Ellison v. Ellison, 6 Ves. 656 Lord Eldon said: "I take the distinction to be that, if you want the assistance of the court to constitute you *cestui que trust,* and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust,* as, upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant. But if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being completely made, the equitable interest will be enforced by this court."

In the reliable elementary works, the result of the decisions is stated to be, that, if the trust is perfectly created, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settlor, and nothing is required of the court but to give full effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed. But if, on the other hand, the transaction is incomplete, and its final completion is asked in equity, the court will not interpose to perfect the settlor's liability without first inquiring into the origin of the claim, and the nature of the consideration given. Perry on Trusts, sec. 98; Adams, Eq. 6th

Am. Ed. 194-5; Lewin on Trusts, 2d Am. Ed. 134, 135; 2 Story's Eq. Jur. sec. 793a.

In McFadden v. Jenkyns, 1 Hare, 458, Sir J. Wigram, V. C., after citing all the principal English decisions, made these observations: "There may be difficulty in reconciling with each other all the cases which have been cited. Perhaps they are to be reconciled and explained upon the principle that a declaration of trust purports to be, and is, in form and substance, a complete transaction, and the court need not look beyond the declaration of trust itself, or inquire into its origin that it may be in a position to uphold and enforce it. Whereas an agreement or attempt to assign, is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the court; and where there is no consideration, the court, upon its general principles, cannot complete what it finds imperfect."

These views of that great judge seem to have been cautiously expressed, but to us they seem to be a complete exposition of the principle which ought to govern in a case like this.

So, in Beech v. Keefe, 18 Beav. 285, Sir John Romilly, Master of the Rolls, quoting from his judgment in Bridge v. Briggs, 16 Beav. 315, says: "If a person, possessed of stock, execute a declaration of trust of that stock in favor of a volunteer, he would, I apprehend, clearly constitute himself a trustee for the volunteer, and equity would execute the trust and compel a transfer of the stock to the *cestui que trust.* But if the same person executed an assignment of the stock in favor of the volunteer, and no transfer of the stock took place, this, I apprehend, would as clearly be considered to be no more than an imperfect gift, in which the donor had not done all that was in his power to do, and the donee would get no assistance from a court of equity to compel a transfer of the stock."

Now, here, as we have seen, there was no declaration of trust, and the very nature of the instrument precludes the idea of an intention on the part of the donor to create the relation of trustee and *cestui que trust* between him and defendant in error.

The substance of the transaction is, that the donor executed an assignment of $12,000 out of his estate, in favor of a volunteer, and provided for its payment, after his death, out of promissory notes payable to himself, some of which were secured by mortgages upon real estate. These notes were capable of legal transfer, but only in the mode pre-

scribed by our statute, viz: by indorsement on the back by the payee, and delivery. It could not be done by a separate instrument. Ryan v. May, 14 Ill. 49; Fortier v. Darsy, 31 Ill. 212.

On five of the notes there had been an assignment written by the payee some six months prior to the instrument of September 6, 1871, but no delivery. The circumstances of that transaction are not disclosed. It was incomplete. The title did not vest in the assignee. On the other notes there was never any indorsement, and there can be no question that the legal interest in all these notes remained in the donor down to and at the time of his death. This bill is brought by the volunteer, to have the court complete what the donor left incomplete, by compelling the transfer to him of the legal interest in these notes. There being no consideration, the court, upon its general principles, cannot complete what it finds thus incomplete.

As was said by this court in Clarke v. Lott, 11 Ill. 115: "The principle is well settled, that a court of equity will not lend its aid to establish a trust at the instance of mere volunteers. If the transaction, on which the voluntary trust is attempted to be esablished, is still executory or incomplete, the court will decline all interference in the matter."

There was something said in argument by counsel for defendant in error, about there being a meritorious consideration. That might, perhaps, arise in favor of a wife or child, where there is a moral obligation and duty of support on the part of the donor. But here the defendant is a grandchild, and he asks the aid of the court in completing this transaction as against the other grandchildren of the donor, whose claim is equally meritorious. There was an attempt made by plaintiff below to show by the declarations of the donor, that the other children were provided for, but whatever force there was in that evidence, it was rebutted by the evidence of defendants below.

The decree of the court below will be reversed and the cause remanded.

Decree reversed.

LOCKREN v. RUSTAN.

(Supreme Court of North Dakota, 1899, 9 N. Dak. 43, 81 N. W. 60.)

BARTHOLOMEW, C. J. . . . In 1881, Ole Helgeson Rustan, with his family, removed from the State of Minnesota to Walsh county in

this state, and acquired the title to the Walsh county lands here in dispute under the government land laws. While resident in Minnesota he contracted quite a large indebtedness, which remained unpaid when he settled in Walsh county. He received a receiver's final receipt for 160 acres of said land on December 20, 1881, and very soon thereafter he and his wife joined in a conveyance of said land by warranty deed to one M. Raumin. Said deed was made without any consideration whatever, but with the understanding that the said Raumin should convey said land to Helge O. Rustain, the son of Ole Helgeson Rustan, and the same was so conveyed a few days thereafter by warranty deed. Helge O. Rustan was at that time a lad about 13 years of age. On August 10, 1883, Ole Helgeson Rustan received the final receiver's receipt upon the other quarter section of land in Walsh county, and very soon thereafter he joined with his wife in a conveyance of the same to his brother-in-law, one Mylie. This conveyance was also without consideration, but made with the understanding that the said land should be conveyed to said Helge O. Rustan, and it was so conveyed in 1887. The avowed object of Ole Helgeson Rustan in thus placing the title to the land in his own son was, as he expresses it, "to get protection until he could pay his debts." The law would say upon this admission that his object was to hinder, delay, or defraud his creditors, and we will so treat it.

The Rustan family continued to reside upon said land. Ole Helgeson Rustan, the father, treated the land in all respects as if it were his own. He paid all expenses incurred in improving and cultivating the same, and received all the produce therefrom. Helge O. Rustan did not know that the title to the land was in his name until about 1890, as the testimony shows. He had executed mortgages upon some of the land, but had signed the papers at the direction of his father, without understanding what they were. But about 1890 the matter was talked over and explained, and the father told him that the land must be deeded back whenever he (the father) desired it, to which the son fully assented. In 1892 the father purchased the land in Cavalier county, paying the full purchase price himself, but had the title transferred to his son Helge, for the same fraudulent purpose that induced him to have the title to the Walsh county land placed in his son. This the son well understood at the time, and promised to convey it to the father whenever by him so requested. Such was the con-

dition of the title and the relative rights of the parties on August 20, 1896, when the son,—he says at the request of his father,—without any money consideration whatever, conveyed all the land to his father. It should be stated that prior to this time, and prior to the bringing of the breach of promise action, Ole Helgeson Rustan had settled all his old debts, and owed nothing except what was secured. Under this state of facts, was the conveyance from son to father in fraud of the rights of the plaintiff?

It must be conceded that no such conveyance could have been enforced. There was no trust relation between these parties, either by contract or as a resulting trust or *ex maleficio*. Where a trust exists, it can be enforced in equity. The son held the full legal title, and he held the equitable title, as against all the world except the creditors of the father. They, so far as we know, never at any time sought to disturb the title of the son. The land in the hands of the son was subject to his debts. Had a creditor of his obtained judgment against him while the title stood in his name, the judgment would have been a lien upon the land, and no transfer to the father could have affected the lien. To that extent the grantee, in a conveyance made to hinder, delay, or defraud creditors, is the owner of the land. But, as to strangers to the conveyance, the property rights of the fraudulent grantor in the subject of the grant are superior to the property rights of the fraudulent grantee. In other words, in a contest between the creditors of the grantor and the creditors of the grantee, the former will succeed. Bank v. Lyle, 7 Lea, 431; Clark v. Rucker, 7 B. Mon. 583. This shows that the property rights of the vendor have not been extinguished. But the law, for reasons of public policy and to discourage fraudulent conveyances, will not permit him to assert them. If, then, these property rights exist; if the grantor purchased and paid for the property and has never received anything therefor from the grantee; if the only right or equity that the grantee has in the property is his right to claim the protection of a technical rule of law that will not permit him to be attacked, not by reason of any rights in him, but solely on the ground of public policy, —it must follow that, in good conscience and morals, the grantee ought to reconvey to the grantor, if the latter so request. In Wait, Fraud. Conv. § 398, it is said: "Though a reconveyance cannot be enforced, the fraudulent vendee is said, in some of the cases, to be

under a high moral and equitable obligation to restore the property. The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith; and, until the creditors of the vendee acquire actual liens upon the property, they have no legal or equitable claims in respect to it higher than or superior to those of the grantor." See, also, Biccohi v. Casey-Swasey Co. (Tex. Sup.) 42 S. W. Rep. 963; Davis v. Graves, 29 Barb. 480; Dunn v. Whalen (Sup.) 21 N. Y. Supp. 869; Moore v. Livingston, 14 How. Prac. 1; Starr v. Wright, 20 Ohio St. 107; White v. Brocaw, 14 Ohio St. 341; Bank v. Brady, 96 Ind. 509; Sabin v. Anderson (Or.) 49 Pac. Rep. 872. There being, then, a moral obligation of the highest type resting upon the son to convey to the father, the discharge of that obligation furnishes ample consideration for such conveyance, and the conveyance, if received in good faith, works no legal fraud upon any party whose rights to the property conveyed are not in law superior to the rights of the father. . . .

In the case at bar it is too plain for suggestion that Ole Helgeson Rustan, in receiving the conveyance from his son, occupied the position of one who received the conveyance in extinguishment of a pre-existing obligation. He had the highest motive of self-interest to serve. If he did not obtain the deed to the land, circumstances might, and probably would, make it forever impossible for the son to fulfill his obligation to his father. True, he knew that, by receiving satisfaction of this obligation, he necessarily postponed the claim of plaintiff. But he was under no obligation, legal or moral, to protect her rights. Indeed, in some respects, his equities are greater than those of an ordinary creditor who receives a conveyance. Generally, the grantor cancels his obligation by transferring his own property in satisfaction thereof. Here the grantor canceled his obligation by transferring to the grantee what was in morals, but not in law, the grantee's own property. We are clear that no fraud can be charged to this grantee, unless the evidence and circumstances establish the fact that he took the conveyance, not to save his property, but to hinder, delay, or defraud the plaintiff. We do not think that is the case. True, the ever-present thought that he regarded plaintiff's claim as unjust, and was bitterly opposed to permitting her to receive anything thereon, makes it difficult to draw the distinction. The grantee testifies that he

told his son that he wanted the land back, and requested him to make the deed; that he knew his son was getting into trouble by reason of plaintiff's claim, and he feared that, if the land was left in the son's name, the plaintiff might get hold of it; that she might get a judgment that would be a lien upon it. He categorically denies that his object in taking the conveyance was to hinder or defraud plaintiff, and this, we think, is substantially true, notwithstanding his aversion to her recovering anything. The desire that he may have had that his son should not pay this claim must, in the nature of things, have been entirely subordinate to his desire that the son should not pay the debt with his (the father's) property. His interest in protecting and preserving his own property must have been immeasureably greater than any interest he could have in defrauding plaintiff. We are bound to believe that he was influenced by the stronger, and not by the weaker, motive, particularly when all the direct evidence so declares. And, indeed, in protecting and preserving his own property, he could not defraud plaintiff, because she could have no claim upon his property. But it is urged that it is certain that he did not take the property back because he wished to preserve it for himself, for the reason that he immediately conveyed it to another son, and the trial court found that this transfer was without consideration. We do not deem this latter point of importance. It is clear to us that in deeding the property to another son he acted *ex abundanti cautela,* and in the mistaken belief that he was thus placing another barrier between his property and the danger that menaced it. We find nothing in the record that requires a reversal. We adopt the judgment and decree of the trial court, which are in all things affirmed. All concur.

JEWELL v. BARNES' ADMINISTRATOR.

(Kentucky Court of Appeals, 1901, 110 Ky. 329, 61 S. W. 360.)

Appellant, Robert M. Jewell, filed this suit against the appellees, the Louisville Trust Company, as the administrator with the will annexed, and S. S. Barnes, the residuary devisee, of C. P. Barnes, deceased. The court below sustained a demurrer to his petition, and,

he failing to plead further, dismissed the action. The only question on the appeal is, therefore, did the petition state a cause of action?

It was alleged in the petition that C. P. Barnes was at the time of his death, and had been for many years theretofore, engaged in business as a jeweler, with his brother, J. B. Barnes, under the firm name of C. P. Barnes & Co.; that the business was a large one, and C. P. Barnes became a wealthy man; that in the year 1877, when appellant was a small boy, the deceased took him into his employ and treated him as if he had been his own son, often promising him an interest in the business; that appellant started with a small salary, which was increased from time to time until the death of the deceased, when he was receiving $20 a week; that the deceased died, leaving a will which was duly admitted to probate, and by the seventh clause of the will the testator provided for him in the following language: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitles him to." It is also alleged that on February 23, 1895, within a month after the death of the testator, against his protest, his salary was cut down from $20 to $15 a week, and three years later, on February 26, 1898, to $13.50 a week; that about two months after this, without fault on his part, he was discharged, against his protest, and had been unable to earn anything like $20 a week from the time of his discharge to the filing of the suit; that appellees were running the store with great profit, and it was incumbent on them, under the will, to keep him in their employment at $20 a week; that his wages for the time amounted to $4,780, and he had only received $3,045.70, leaving a balance due him of $1,734.30; that C. P. Barnes was the owner of a larger interest in the firm than his brother, J. B. Barnes, and by his will gave to his brother enough of his holdings in the firm to make the brother and the testator's widow, appellee, S. S. Barnes, equal partners in the business; that they continued the business under the same firm name from the death of the testator, on February 5, 1895, until May 19, 1897, when the brother, J. B. Barnes, sold out his interest in the firm to the widow, appellee, S. S. Barnes, and that she had continued the business under the name of C. P. Barnes & Co. It will be observed that the brother, J. B. Barnes, is not sued. The suit is brought against the personal representative and the widow as residuary devisee. It will be also observed that, although appellant's salary was cut down

to $15 soon after the testator's death, he continued with the firm and continued to accept the salary that was paid him; and things remained in this shape until after J. B. Barnes sold out, and appellee S. S. Barnes took charge of the business in her own right, after the dissolution of that firm, and appellant continued to work for her and to accept the reduced salary from her until he was discharged by her something like a year afterwards.

It is insisted for appellant with great earnestness that the will creates a precatory trust in his favor, and that he is entitled under the will to his wages at $20 a week. The will does not fix the salary that appellant is to receive if retained in the employ of the firm, nor does it require that he shall be retained. The language imports no more than an expression of the testator's desire, and the clause was, no doubt, put in this shape so as not to embarrass the devisees in the management of their affairs. The will contemplated that the brother and wife of the testator, as a firm, would continue the business; and to this firm the testator expressed the desire that it would retain appellant in its employ on such liberal terms as his long and faithful service entitled him to. The amount of compensation is expressly left to the firm, and no desire is expressed as to anything that should be done after that firm went out of business. The suit here is not against that firm, and, if this action can be maintained, the clause in question will amount, in substance, to a charge of an annuity upon the widow, appellee, S. S. Barnes, in favor of appellant, unless she quits the business. The testator clearly intended no such result. In Shaw v. Lawless, 5 Clark & F. 129, the testator expressed his "particular desire" that the devisee, when he received the property, should continue L. "in the receipt and management thereof, and likewise employ and retain him in the receipt, agency and management of the rents," at the usual fees allowed to agents for this reason, as expressed in the will: "He having acted for me, since I became possessed of said estate, fully to my satisfaction." It was held that no precatory trust resulted. Among other things, the Lord Chancellor said: "All cases upon a subject like this must proceed on a consideration of what was the intention of the testator. Now, the first observation that strikes one with reference to that matter is that during the life of the testaor Lawless was his agent. But then he was agent only during the testator's pleasure, and by the terms of the will the testator desired that he should continue

in the agency. Is that desire to be considered a command? If so, for what length of time is he to continue. . . . If Lawless is the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he had a clear interest in the residue, for he might take one-twentieth part of the residue; he might file a bill in chancery in order to control the application of the residue and claim to be absolutely invested in what he is entitled to receive, namely, this one-twentieth part." So, here, if the clause in question created a precatory trust, appellant would have been entitled to maintain a bill in equity to protect his rights and prevent the firm from taking any steps that might imperil his annuity. Such a right might render the estate of the devisee materially less valuable, and make appellant to no small extent, the real beneficiary under the will. The case above referred to was followed in Foster v. Elsley, 19 Ch. Div. 518, and Finden v. Stephens, 22 Eng. Ch. 142. See, also, Perry, Trusts, section 123. The firm composed of the widow and the brother were not required to continue the business. They might close it out at pleasure. If they had sold to a stranger, clearly no trust would have attached in favor of appellant to the assets in their hands received from the sale. When the brother sold to the widow, he was acquit of all responsibility. It was not the testator's purpose to create a permanent charge of the corpus of the estate in the hands of the devisees; and the widow after her purchase was under no obligation to keep appellant indefinitely in her service, regardless of the amount of business she did, or other circumstances affecting her interest. Judgment affirmed.

HOEFFER v. CLOGAN.

(Supreme Court of Illinois, 1898, 171 Ill. 462, 49 N. E. 527.)

CARTWRIGHT, J. . . .The devise and bequest were made to the Holy Family Church in trust for a specific purpose, which was, that the church expend the proceeds of the sale of the real estate and the amount of the bequest in masses for the repose of the souls of the persons named. They were not intended as gifts to the church for its general uses, and any other application than that specified in the will would contravene the purpose of the testator. This being so, it

is claimed that the trust is void because it is a private trust with the souls of particular deceased persons as beneficiaries, none of whom can come into court and call the trustees to account or enforce its execution and also for want of a trustee capable of taking legal title to the property. On the other hand, it is claimed that the devise and legacy are for a charitable use within the meaning and spirit of the doctrine on that subject, and if this position is correct, the rules of law which would invalidate them as an express private trust will not affect their validity.

The doctrine of charitable uses has been repeatedly held to be a part of the law of this State. The equitable jurisdiction over such trusts was not derived from the statute of charitable uses, (43 Eliz., chap 4) but prior to and independently of that statute charities were sustained, irrespective of indefiniteness of the beneficiaries or the lack of trustees or the fact that the trustees appointed were not competent to take. (Heuser v. Harris, 42 Ill. 425; Vidal v. Girard, 2 How. 127.) The statute, however, became a part of the common law of this State. Heuser v. Harris, *supra;* Hunt v. Fowler, 121 Ill. 269; Andrews v. Andrews, 110 Ill. 223.

The statute of charitable uses of Elizabeth has, since its passage, been considered as showing the general spirit and intent of the term "charitable," and the objects which come within such general spirit and intendment are to be so regarded. The definition given by Mr. Justice Gray in the case of Jackson v. Phillips, 14 Allen, 56, was adopted and approved by this court in the case of Crerar v. Williams, 145 Ill. 625. It is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Any trust coming within this definition for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust. Among such objects are the support and propagation of religion

and the maintenance of religious services, (Andrews v. Andrews, supra,) to pay the expense of preaching and salary of rectors, (Alden v. St. Peter's Parish, 158 Ill. 631,) or the preaching of an annual sermon in memory of the testator. Duror v. Motteux, 1 Ves. Sr. 320.

The doctrine of superstitious uses arising from the statute 1 Edward VI, Chap. 14, under which devisees for procuring masses were held to be void, is of no force in this State and has never obtained in the United States. In this country there is absolute religious equality, and no discrimination, in law, is made between different religious creeds or forms of worship. It cannot be denied that bequests for the general advancement of the Roman Catholic religion, the support of its forms of worship or the benefit of its clergy, are charitable, equally with those for the support or propagation of any other form of religious belief or worship. The nature of the mass, like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrifice on the cross, Christ offering Himself again through the hands of the priest and asking pardon for sinners as He did on the cross, and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship,—a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service and render it a mere private benefit. While the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less public acts of worship because of their memorial character, and in Duror v. Motteux, *supra,* the trust for the preaching of an annual sermon in memory of the testator was held to be a charitable

use. The mere fact that the bequest was given with the intention of obtaining some benefit or from some personal motive does not rob it of its character as charitable. The masses said in the Holy Family Church were public, and the presumption would be that the public would be admitted, the same as at any other act of worship of any other christian sect. The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money paid is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood.

In the case of Schouler, Petitioner, 134 Mass. 426, it was held that a bequest of money for masses was a good charitable bequest of the testatrix, and the court said: "Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities." So in Pennsylvania, it has been held that a bequest to be expended in masses for the repose of souls is a religious or charitable bequest under the statute. (Rhymer's Appeal, 93 Pa. St. 142; Selbert's Appeal, 18 W. N. Cas. 276.) A recent case decided in the Irish courts, January 24, 1897, is Attorney General v. Hall. It was held unanimously, both in the Exchequer and the Court of Appeals, that a bequest for saying masses for the soul of a deceased person was a good charitable bequest.

In New York and Wisconsin it has been held that a trust of this character is void for the want of a definite beneficiary to enforce its execution. (Holland v. Alcock, 108 N. Y., 312; McHugh v. McCole, (Wis.) decided October 27, 1897. But the decisions in those States are readily distinguishable from the rule in this State. In New York charitable uses were abolished by legislation, and in all valid trusts there must be a definite and certain beneficiary to take the equitable title, unless the act of 1893, which is said to have resulted from the decision in Tilden v. Green, 130 N. Y. 29, has enlarged or relaxed the rule as to a definite beneficiary. In Wisconsin all trusts are abolished by statute, except certain specific trusts where there is certainty in the beneficiaries, and in that State bequests have been held to be void which have been uniformly sustained in this court as for charitable purposes. The decision in McHugh v. McCole, *supra,* was upon the ground that the doctrine of charitable uses was not in force in that State, and

that a trust to be sustained, must be of a clear and definite nature, and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument. The will in that case gave a certain sum of money to the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, to be used and applied in specified amounts for masses for the repose of testator's soul and the souls of certain named persons. It was held invalid solely on the ground that the provision amounted to a trust which, under the statutes of that State, was invalid. It was said that if the testator had made a direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of persons named in his will it would be valid, and the court said: "We know of no legal reason why any person of the Catholic faith believing in the efficacy of masses may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul or the souls of others, as he may choose." The court expressed regret that the intention of the testator could not be given effect because he had put it in the form of a trust provision. So, also, in New York it has been held in several cases that a bequest to a named priest for the saying of masses for the repose of the souls of specified persons is valid. Ruppel v. Schlegel, 7 N. Y. Sup. 936; In re Howard's Estate, 25 id. 1111; Vanderveer v. McKane, 25 Abbott's N. C. 105.

The case of Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327, holds that a bequest to that church in the city of Mobile, to be used in solemn mass for the repose of the testator's soul, could not be supported as a charitable bequest. The decision seems to be on the ground that the testator's own soul was the exclusive object and beneficiary of the trust, and that no public benefit was to be derived from it and no living person was able to call the trustee to account. We are not able to agree with the conclusion that there is no benefit to the church or public in such case, and, as we have seen, the ceremonial of the mass is a public action which can be seen and taken cognizance of, so that there is no more difficulty in procuring a mass to be said than there is in securing the public delivery of a sermon or a lecture. A bequest for the erection of a public statute or monument to a distinguished person is a good charitable bequest, and yet such person, if deceased, could not enforce its execution, but the courts could and would do it.

We think the devise and legacy charitable, and a rule applicable to trusts is that they will not be allowed to fail for want of a competent trustee. The court will appoint a trustee or trustees to take the gifts and apply them to the purposes of the trust. Heuser v. Harris, *supra.*

The decree of the circuit court is reversed and the cause is remanded, with directions to proceed in conformity with the views herein expressed.

Reversed and remanded.

BARKLEY v. DONNELLY.

(Supreme Court of Missouri, 1892, 112 Mo. 561, 19 S. W. 305.)

THOMAS, J. This is a suit in equity by the heirs of Mary A. Troost to recover the beneficial interest in certain property in Kansas City, attempted to be donated by the will of Mrs. Troost to certain religious and charitable objects, and asking a construction of the will for this purpose. . . .

The petition sets out the will *in haec verba,* which after devising considerable property to the plaintiffs, and making a few other special bequests, contains the following: . . .

"Item 18. I give and devise to the City of Kansas the parcel of land . . . containing from five to ten acres . . . called the 'Fry Place,' to hold the same in trust, however, for the following uses and none other: for a home and place for the maintenance and education of poor children, and the same shall be called the 'Gillis Orphan Asylum.' . . ."

Another contention of plaintiffs is that the trusts upon which the Fry Place, and the lots upon which the Gillis opera house has been built were devised, cannot be carried out for two reasons: First, because the beneficiaries thereof are so indefinite and uncertain that they cannot be ascertained, there being no power in the City of Kansas or the trustees named "to determine who are 'poor children,' or to, select from the innumerable multitude upon the earth those that shall partake of the testatrix's 'bounty' ".

This proposition cannot be maintained. The bequest is for a charity and for charitable uses. The beneficiaries then are "poor children" who are objects of charity, and such "poor children" are and have always been a well-recognized and a well-defined class.

But it is urged that the bounty must wholly fail, because the charity of this lady extended to an "innumerable multitude," and was as broad as the earth. We cannot yield assent to this doctrine. When the asylum is built, and is filled to its capacity with poor children, it would be inhuman to turn those out who are under its protecting care, because it could not receive all who might apply, and who might be found to be worthy. The charitable institutions of earth will not be closed, ought not to be closed, simply because they have not the means or capacity to relieve all the suffering that flesh is heir to. The poor we have always with us, and our first and most sacred duty is to care for those who are unable to care for themselves, and courts of equity have always been liberal in the construction of wills devising property for charitable uses.

Among others, the following devises have been upheld: "To furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the west" (Chambers v. City of St. Louis, 29 Mo. 543); "for the worship and service of God" (Attorney General v. Pearson, 3 Meriv. 352); "for objects and purposes of charity, public and private" (Saltonstall v. Sanders, 11 Allen, 446); "for the benefit of the Christian religion, to be applied in such manner as, in the judgment of the executor would best promote the object named" (Miller v. Teachout, 24 O. St. 525); "Such charitable institutions of the city of St. Louis, Missouri, as the executor might deem worthy" (Howe v. Wilson, 91 Mo. 45); for "such charitable purposes" as the trustee might deem best (Powell v. Hatch, 100 Mo. 592); for the suffering poor of the town of Auburn" (Howard v. American Peace Society, 49 Me. 288); and for "a church school for boys" (Halsey v. Convention, 23 Atl. Rep. (Md.) 781.) . . .

QUIMBY v. QUIMBY.

(Illinois Appeal Court, 1912, 175 Ill. App. 367.)

McSURELY, J. Jane E. Reynolds by her will dated September 4, 1889, devised and bequethed her entire estate to Benjamin F. Quimby,

upon certain trusts therein mentioned, "giving to him as such trustee such power and authority over the property . . . as may be necessary to carry my intentions into effect in the execution of my will."

The controversy before us arises over the bequest of the remainder of her estate, which is as follows:

"I further direct my said executor to give and convey all the remainder of my estate, goods and chattels to my beloved grandson Walter Reynolds Quimby, whenever he may appear and make claim to or for the same. If, however, at the expiration of five years from the date of my said decease, my said grandson does not so appear and at the end of such period of five years it is not known that my said grandson is living, I hereby direct that all that may remain of the money and amounts due me which may be collected by my said executor or trustee, with the accumulated interest, shall be paid to the Chicago Waif's Mission and Training School."

The grandson, Walter Quimby, never appeared. He had disappeared in 1880, some nine years prior to the making of the will, and was never found. It is alleged in the answer filed by the heirs claiming the fund that he is dead that he died before the death of Jane E. Reynolds, and the decree entered by the chancellor so finds.

The Chicago Waif's Mission and Training School was a voluntary association conducting a Sunday School for neglected children in the city of Chicago, and afterwards in addition to religious services began looking after the temporal welfare of dependent boys. It was organized as a corporation not for profit on January 22, 1889, the objects, as stated in its articles of incorporation, being "to provide suitable homes for the homeless and the dependent and needy boys and girls in the State of Illinois, wherein they may be properly cared for while they are being educated and taught some useful trade or occupation, and aid them in various other ways."

Mrs. Reynolds, the testatrix, having died on November 17, 1894, the five years within which her grandson Walter Quimby, could claim the bequest to him expired on November 17, 1899. At that time the Chicago Waif's Mission and Training School had wholly ceased to carry on the work for which it was organized, or any other work, having about a year prior to that time turned over to the Illinois Industrial Training School for Boys, at Glenwood, Illinois, all of its property and boys. The Illinois Industrial Training School for Boys after-

wards changed its name to the Illinois Manual Training School Farm, and is the appellant here. On July 1, 1902, an order of cancellation of the charter of the Chicago Waif's Mission and Training School was entered in the office of the Secretary of State, and it has never been reinstated.

Benjamin F. Quimby, the trustee named in the will, having died July 17, 1897, the Title Guaranty & Trust Company was appointed trustee to succeed him on May 4, 1898. The Chicago Title & Trust Company (which by consolidation has succeeded the Title Guaranty & Trust Company as trustee) on November 4, 1908, filed its petition in the chancery court representing that distribution could not be made to the Chicago Waif's Mission and Training School as it had ceased to carry on the charitable work for which it was organized, and set up the claim of the heirs and of others and asked for an order of court in the premises. The bill made as parties defendant the heirs of Walter Reynolds Quimby and "unknown owners." To this bill certain collateral heirs at law of the testatrix filed their answer, as did the Attorney General, who was made a defendant. The Illinois Manual Training School Farm filed its answer as one of the unknown owners made parties defendant to the petition, and claimed the fund under the equitable doctrine of *cy pres,* by reason of the similarity of the work carried on by it to that carried on by the Chicago Waif's Mission and Training School. This training school farm is a corporation not for pecuniary benefit. Its object is stated in its articles of incorporation thus: "To provide a home and proper training school for destitute and dependent boys who may be committed to its charge." Upon hearing, a decree was entered by the chancellor finding the facts as above set forth, and also determining the heirs at law and next of kin of Jane Reynolds, and further that inasmuch as the Chicago Waif's Mission and Training School ceased to carry on the charitable work for which it was organized on July 14, 1898, "and has not since said last mentioned date done or performed any of the work for which it was organized, and has discontinued the exercise of its corporate functions and abandoned its corporate franchises, it is not now entitled to said trust estate or any part thereof." The decree further found "that there is nothing in said will of Jane E. Reynolds, deceased showing a general charitable intention, and showing that the said testatrix intended to devote said trust estate to charitable purposes in the event

that the gift over to the Chicago Waif's Mission and Training School failed, and that therefore the said trust estate ought not to be applied *cy pres* by the court to other charitable purposes." From this decree the Illinois Manual Training School Farm, hereinafter called appellant, has appealed to this court.

Counsel for appellant correctly say that: "The sole question presented is: Does the record make out a case for the application of the *cy pres* doctrine? "The usual definition of the equitable rule of *cy pres* has been stated thus: "When a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, the duty may be performed with as close approximation to that scheme as reasonably practicable." 12 Cyc. 1191. And in White v. Fisk, 22 Conn. 30, the *cy pres* doctrine is thus described: "It seems to be this, that if it can be seen that a charity was intended, by a testator, but the object specified cannot be accomplished, the funds may be applied to other charitable purposes, or that the chancellor may seize them as a sort of waif, and apply them as his, or the king's good conscience, shall direct. . . . In this way the chancellor substitutes himself in the donor's place, and really makes the will himself." If this broad statement of the rule comprehended all the elements involved, the application of it would be comparatively free from difficulty. Courts would determine only whether the organization named by will as the beneficiary was capable of taking, and if it were incapable what other organization nearest approached it in its purposes and work. In undertaking to carry out the intentions of persons making charitable bequests, courts early were met with the question of whether or not the testator had intended to aid a general class needing charitable assistance, or only the particular and specific organization named in the will. Almost without exception, therefore, the cases in which the application of the rule of *cy pres* is sought turn upon the conclusion of this court as to whether or not the will evidenced a general charitable intent. This is the controlling inquiry before us. From an inspection of the clause of the will under consideration it is seen that the testatrix used no special words indicating an intention to benefit needy boys and girls generally; so that the critical question arises, can a general charitable intent to benefit a particular class of dependents be deduced from the sole fact that the organization named

in the will was engaged in charitable work for that particular class of dependents? Or applying the question to the facts before us, can a general charitable intent to benefit needy boys and girls generally, be deduced from the sole fact that the Chicago Waif's Mission and Training School was engaged in charitable work for needy boys and girls? Many cases have been cited by counsel for both parties but none exactly in point as touching this particular question.

The general rule stated in Pomeroy's Equity Jurisprudence, vol. 3, page 1964, is: "A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object cannot be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust; it wholly fails." And in Underhill on Wills, vol. 2, page 1230, the statement is made: "If, however, the testator has not used language from which a general charitable intent may be implied, or if he has pointed out some particular institution or mode of application by which the charity is to be carried out, the court will not decree an execution *cy pres*, when, for any reason, the carrying into effect of the particular charitable intent of the testator becomes impracticable." It would serve no useful purpose to cite the many cases in which is discussed this limitation upon the general rule of *cy pres*, but from a study of these cases it will be seen that the test seems to be this, that if the bequest is to a cause or for a purpose or to aid and further a plan or scheme of public benefit, there is evidence of a general charitable intent. This is illustrated in Richardson v. Mullery, 200 Mass. 247, a case which appellant's counsel urge as sustaining their contention. In this case the gift was "to the life-saving station to be built and established," and it was held not to be a gift to any specific organization, but to whichever life-saving station might be engaged in the usual work of such a station in that locality. A similar case in Mason v. Bloomington Library Ass'n, 237 Ill. 442, where the bequest was to "an art studio or art gallery and studio, meaning thereby a suitable place wherein works of art will be collected, kept, preserved or exhibited for the advancement of education in art." Applying this test to the clause of the will before us, it will be seen at once that the gift is not to any cause, plan or scheme of charity, but to a specific and particular organization. We therefore

must hold that the better resasoning favors the conclusion that no general charitable intent was indicated by the testatrix in her will. To hold otherwise would so extend the application of the rule of *cy pres* as to compel courts to administer charitable bequests in every case where the particular object named in the will is capable of taking, unless apt words negativing such a course should be used in the will. The true rule is that the court will not act for the testator in this regard unless some words are used in the will showing an intention which only the chancery court can carry out.

Counsel for appellant urge that the gift to the Chicago Waif's Mission and Training School being for a charitable purpose, therefore the gift was a charitable gift or a gift to charity. This may be true in a certain sense, but it does not follow from this fact alone that it was a gift to charity generally.

We have reached the foregoing conclusion not forgetting that gifts to charity are especially favored in law, and that courts should be "keen-sighted" to discover an intention to make a gift to charity.

For the reasons above indicated the decree of the chancellor will be affirmed.

Affirmed.

MASON v. BLOOMINGTON LIBRARY ASSOCIATION.

(Supreme Court of Illinois, 1909, 237 Ill. 442, 86 N. E. 1044.)

HAND, J. It is first contended that the first paragraph of the will creates a perpetuity and is void, and that the court erred in appointing a trustee and in directing that the amount remaining of the $500 mentioned in that paragraph, after the purchase of a monument, should be turned over to a trustee to be kept at interest, the interest to be expended in the care of the family burial lot where the testatrix should be buried.

The law is well settled in this country that a perpetual trust cannot be created to take care of a private burial lot unless the creation of such trust is authorized by statute. (6 Cyc. 918; 5 Am. & Eng. Ency. of Law,—2nd ed.—933; Bates v. Bates, 134 Mass. 110; Coit v. Comstock, 51 Conn. 352; 50 Am. Rep. 29; Johnson v. Holifield, 79 Ala.

423; 58 Am. Rep. 596; Hopkins v. Grimshaw, 165 U. S. 342.) In this State the legislature has provided (Hurd's Stat. 1905, p. 223,) that trusts may be created for such purposes in the hands of the board of directors provided for by "An act to provide for the proper care and management of county cemetery grounds," but there is no statute in this State which provides for the creation of such a fund in the hands of a private trustee. A trust created under a statute authorizing a trust to be created in perpetuity for the purpose of caring for and keeping in repair a cemetery, burial lot or monument is characterized by the court in Morse v. Inhabitants of Natick, 176 Mass. 510, (57 N. E. Rep. 996) as a statutory trust in contradiction to a charitable trust. The cases of Green v. Hogan, 153 Mass. 462, and Jones v. Habersham, 107 U. S. 174, are not, therefore, in point. In Bates v. Bates, *supra,* the court said an examination of the authorities (and many cases are cited) "will show that it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial place could not be treated as a public charity and thus made perpetual, and that such bequest would be void." It was also pointed out in that case that there was in force in that State a statute similar to the statute in this state hereinbefore referred to, but it was said "these statutory provisions have here no application." And in Coit v. Comstock, *supra,* it was said: "It has been held in numerous decisions that bequests for the purpose of keeping burial lots or cemeteries in good order or repair are not given in charity, and therefore are not protected by the Statute of Charitable Uses." And in Johnson v. Holifield, *supra,* it was said: "It seems to be well settled by the course of decisions that a bequest of money, the interest thereon to be perpetually applied to preserving and keeping in repair the graves and monuments of testatrix and other named persons, is repugnant to the rule against perpetuities, and void."

We would be glad to hold, were it possible so to do, the trust attempted to be created by the testatrix by the first paragraph of her will valid. We are, however, forced by the current and great weight of authority to hold that a trust like the one in question is not a gift to any public use and that its purpose is purely private and secular. Our conclusion is, therefore, that the trust attempted to be created by the first paragraph of the will is void, and that the portion of the $500 mentioned in that paragraph, remaining after the purchase of the

monument, should be treated as a part of the residuary estate of the testatrix and disposed of under paragraph 9 of said will.

CHAMBERLAIN v. STEARNS.

(Supreme Court of Massachusetts, 1873, 111 Mass. 267.)

GRAY, J. The question presented by this case is, whether a devise in trust, to be applied "solely for benevolent purposes" in the discretion of the trustees, creates a public charity. And we are all of opinion that it does not.

The word "benevolent," of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity; but also any acts dictated by kindness, good will or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense.

The only difference of opinion in the adjudged cases on this subject has been upon the question how far the word "benevolent," when used to describe the purposes of a trust, could be deemed to be limited in its meaning by being associated with other words more clearly pointing to a strictly charitable disposition of the fund. In one case in the English chancery, and another in New Jersey, it has been held that even a bequest to trustees to be applied in their discretion for "benevolent, charitable and religious purposes," was too uncertain to be supported. Williams v. Kershaw, 5 Law J. (N. S.) Ch. 84; S. C. 5 Cl. & F. 111; Norris v. Thomson, 4 C. E. Green, 307, and 5 C. E. Green, 489. On the other hand, it has been held by this court and by the House of Lords, that "benevolent," when coupled with "charitable" or any equivalent word, or used in such connection, or applied to such public institutions or corporations, as to manifest an intent to make it synonymous with "charitable," might have effect according to that intent. Saltonstall v. Sanders, 11 Allen, 446; Rotch v. Emerson, 105 Mass. 431, 434; Hill v. Burns, 2 Wils. & Shaw, 80; Crichton v. Grierson, 3 Bligh N. R. 424; S. C. 3 Wils. & Shaw, 329,

341; Ewen v. Bannerman, 2 Dow & Cl. 74, 101; S. C. 4 Wils. & Shaw, 346, 359; Miller v. Rowan, 5 Cl. & F. 99; S. C. Shaw & Macl. 866.

In the case before us, the devise contains no qualifying or explanatory words, and falls precisely within the case of James v. Allen, 3 Meriv. 17, and the reasons there given. A bequest to executors, "in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion, may unanimously agree on," was there held to be void for uncertainty, and distributable among the next of kin; and Sir William Grant said: "Although many charitable institutions are very properly called 'benevolent,' it is impossible to say that every object of a man's benevolence is also an object of his charity." "What authority would this court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." That decision has never been doubted, and is strongly supported by the arguments of Sir Samuel Romilly and the judgments of Sir William Grant and Lord Eldon in Morice v. Bishop of Durham, 9 Ves. 399, and 10 Ves. 521, and by the opinion of Lord Brougham in Attorney General v. Haberdashers' Co. 1 Myl & K. 420, 428, and Lord Langdale in Nash v. Morley, 5 Beav. 177, 183.

As the duration of the trust now in question is unlimited, and the trust property might, in full accordance with the terms of the devise, be wholly applied by the trustees in their discretion to uses and purposes which are not regarded by the law as charitable, the trust is wholly void, and the property must go to the heir at law and residuary devisee.

Decreed accordingly.

LORENZ v. WELLER.

(Supreme Court of Illinois, 1915, 267 Ill. 230, 108 N. E. 306.)

COOKE, J. . . . In support of her contention that the court erred in refusing to remove the trustees, appellant urges that they are improper persons to serve in this capacity, for the reason that

Herman Weller and Mary Kiick, the wife of Jacob E. Kiick, are contingent remainder-men, and she relies upon Yates v. Yates, 255 Ill. 66, and similar cases, which hold that contingent remainder-men should not ordinarily be appointed as trustees of the lands in which such remainder exists, and that where such appointment is made and it is opposed by the *cestuis que trustent* who are life tenants, they should be removed by a court of equity upon proper proceedings being instituted. In the Yates case the trustee, who was a contingent remainder-man, was not appointed by the will but was appointed by the original trustee under a provision of the will authorizing him to appoint as his successor some suitable person to execute the trust. The holding in the Yates case is correct but it has no application to the situation here. There the court was dealing with the question whether one who had been appointed as a successor in trust under a power to appoint a suitable person as such successor should be removed by reason of his relationship to the property, while here appellant is asking the court to remove the trustees appointed by the will. It does not necessarily follow that because a court of equity would not, under given circumstances and conditions, appoint certain persons to execute a trust created by a will, that the testator himself could not make a valid appointment of such persons under the same conditions. The desires of a testator in the appointment of a trustee will be observed although he may see fit to appoint a person whose relationship to the estate is such that a court of equity would not appoint him if the appointment was to be made by the court.

Appellant further contends that the trustees should be removed because of the feeling of animosity they admitted and displayed toward her. On the hearing Herman Weller testified that the relations between himself and Henry Lorenz and appellant had not been friendly; that the trustees did not consult appellant or her father as to any of their acts in the execution of the trust; that he did not know how long he had been on unfriendly terms with appellant's family; that it was impossible to be friendly with them, and that he had never known appellant when he could be friendly with her. This is the only testimony on this subject. It does not appear that appellant has ever made an effort to consult with the trustees in regard to the execution of the trust or upon any matters relating thereto, or that they have refused or declined to consult with her or carry out her wishes

so far as the same would be compatible with their duties. While it is true that in many cases it has been said that where the ill feeling between trustees or between the trustees and the *cestui que trust* has become so bitter as to prevent beneficial co-operation in the administration of the trust, the trustee or trustees offending will be removed, that situation does not exist here. While Herman Weller admits he is not on friendly terms with appellant or her father, it does not appear that the relations are such as to interfere with the beneficial administration of the trust. No complaint is made that the management of the estate by the trustees has not been frugal, honest or beneficial.

Appellant complains that one-third of the receipts during the time covered by the two reports filed by the trustees has been paid out for expenses, exclusive of commissions and attorney's fees, argues that this is too large a proportion to put back on the lands in the way of betterments, and insists that it indicates an improper administration of the trust. She does not point out any particular item as having been improperly expended, and no attempt was made upon the hearing to show that unnecessary expenses had been incurred in the way of improving the property.

From a careful consideration of the record we find no basis for the contention that the court erred in refusing to remove the trustees.

The decree of the circuit court in so far as it approved the item paid out for inheritance tax is reversed. In all other respects it is affirmed, and the cause is remanded to the circuit court, with directions to sustain the objection to the item paid for inheritance tax.

Reversed in part and remanded, with directions.

BEAVER v. BEAVER.

(New York Court of Appeals, 1889, 117 N. Y. 421, 22 N. E. 940.)

This action was brought by the plaintiff, as executor of Aziel G. Beaver, against The Ulster County Saving Institution, to recover certain deposits amounting to the sum of $2,800 or thereabouts, standing to his credit on the books of the bank.

The administrators of John O. Beaver claiming the money as part of his estate, they were substituted as defendants in place of the bank, the money having been brought into court. The question litigated

was, whether the money represented by the deposits and the accumulations had been vested in Aziel G. Beaver, as a gift from John O. Beaver. The account with the bank consisted of two deposits, one July 5, 1866, of $854.04, and one of October 5, 1866, of $145.96, making in the aggregate $1,000, and the accumulations thereon. It is undisputed that the deposit of $854.04 was made in person by John O. Beaver, and that the money deposited belonged to him. The only evidence to sustain the claim that it was given by him to Aziel G. Beaver is found in the relations between them, and the circumstances attending the deposit. Aziel G. Beaver was the son of John O. Beaver, and in 1866 was seventeen years of age and resided with his father, as one of a family of thirteen children. John O. Beaver made the deposit of July 5, 1866, in the name of Aziel. The rules of the bank required that on making the first deposit the depositor should subscribe a declaration of his assent to the by-laws of the institution and his promise to abide by them. John O. Beaver, at the date of the first deposit, signed, in his own name, a declaration presented to him by the treasurer of the bank, commencing with the words, "I, Aziel G. Beaver, of Esopus, Ulster county, hereby request the officers of the Ulster County Savings Institution to receive from me $854, and to open an account with me," etc. At the same time the savings bank entered on its books an account beginning: "Dr. Ulster County Savings Bank, in account with Aziel Beaver," and crediting said Aziel with the deposit of $854. Under the name of Aziel Beaver were originally written the words, "payable to John O. Beaver." The bank also, at the same time, issued and delivered to John O. Beaver a pass book with a similar entry, as in the account on the books of the bank, containing also, as originally written the words "payable to John O. Beaver".

There are no facts, except as above stated, tending to show a gift of the money deposited to Aziel. On the other hand, many circumstances were shown which are claimed to be inconsistent with a gift by the father to the son of the money deposited. The son married a few years after the deposit was made, and died in 1886, twenty years after the date of the deposits, being then of the age of thirty-seven years, leaving a wife, but no children, surviving. John O. Beaver, the father, died in 1888. The father retained possession of the pass-book at all times until his death. . . .

ANDREWS, J. It is found that the money with which John O. Beaver made the deposit of $854.04, July 5, 1866, belonged to him. The inference that the deposit, $145.96, made October 5, 1866 was also made by him from his own means, does not admit of reasonable question. The pass-book was at all times in his possession. Concurrently with the last deposit, the amount was entered therein. It is affirmatively shown that Aziel, who was then a minor, lived with his father and had no money of his own, and the circumstances are quite satisfactory to show that he never, at any time during his life knew of the bank account. The question in the case turns upon the legal effect of the deposit, made in connection with the attendant and subsequent circumstances. . . .

There was no declaration of trust in this case, in terms, when the deposit of July 5, 1866, was made, nor at any time afterwards, and none can be implied from a mere deposit by one person in the name of another. To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created. It would introduce a dangerous instability of titles, if anything less was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention. . . .

It may be justly said that a deposit in a savings bank by one person, of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons; reasons connected with taxation; rules of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire, on the part of many

persons, to veil or conceal from others knowledge of their pecuniary condition. In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case. It may be true that as between parent and child a presumption of a gift may be raised from circumstances, where it would not be implied between strangers. (Ridgway v. English, 22 N. J. L. 409.) But where a deposit is made in the name of another, without any intention on the part of the depositor to part with his title, he would be quite likely to select a member of his own family to represent the account, and in this case this is the natural explanation of the transaction. . . .

We think, for the reasons stated, that the plaintiff failed to establish a gift, or to justify a finding of a gift. The question of gifts, in connection with deposits of savings banks, has of late years been frequently considered by the courts in various states. The preponderance of authority seems to be in favor of the views we have expressed. . .

DEAN v. NORTHERN TRUST CO.

(Supreme Court of Illinois, 1913, 259 Ill. 148, 102 N. E. 244.)

FARMER, J. . . . It was immaterial to a construction of the will, which was the object of the suit, whether the law under which the Northern Trust Company was organized, and the law authorizing the appointment of it as trustee, were valid or not. If it was unauthorized to act as trustee that would not invalidate the will. The trust created by the will for the benefit of Morris Rowland Dean was a valid trust even if the trustee was not eligible to be appointed to or to act in that capacity. (1 Perry on Trusts, sec. 38.) If the appointment of the Northern Trust Company as trustee was unauthorized because it could not act in that capacity, it would not alter or affect in any way

the rights of appellant under the will. That would only require the appointment of a new trustee. "If a trust is cast upon a person incapable of taking and executing it courts of equity will execute the trust by the decree, or they will appoint some person capable of performing the requirements of the trust." (1 Perry on Trusts, sec. 39.) Courts of equity will not allow a trust to fail for want of a trustee. (1 Perry on Trusts, sec. 240; Wilson v. Clayburgh, 215 Ill. 506; French v. Northern Trust Co. 197 id. 30.) The author of the trust has the power to provide for the appointment of a successor in trust if the original trustee cannot act or fails to act for any reason, but where the author of the trust makes no such provision a court of chancery has power to make the appointment. . . .

REYBURN v. BAKEWELL.

(Missouri Court of Appeals, 1901, 88 Mo. App. 640.)

BLAND, P. J. The agreed state of facts decide the case without anything more. Miss Reyburn, in effect, put in defendant's hands $905.68 in money and said to him "this is yours, keep it for yourself, if you will, if you will not accept it as a gift from me, keep it in trust until the death of my brother, paying him the interest, after his death, give it to the Little Sisters of the Poor of the city of St. Louis." Miss Reyburn parted with all dominion and control over the money, it became defendant's absolutely as it was already in his hands, to keep as a gift or to hold in trust as he might elect. He has generously elected to treat it as a trust and has assumed the obligations of a trustee in respect to it. By his election he is now bound to carry out the provisions of the trust and should be permitted to do so without hindrance, for the trust is a sacred one and should not be disturbed.

The judgment is for the right party and is affirmed. All concur.

SECTION III. NATURE OF CESTUI'S INTEREST.

EWING v. PARRISH.

(Missouri Court of Appeals, 1910, 148 Mo. App. 492, 128 S. W. 538.)

GOODE, J. . . . Plaintiff is seeking to collect in the ordinary way a money demand from the Mudd estate as a debtor of the Pitkin estate. But if anything is due the latter estate from the Mudd estate, the liability, in our opinion, did not arise in such a way as to make it recoverable in this kind of proceeding. It could only have arisen from Mudd being trustee for plaintiff as administrator, first of the land he bought in at the foreclosure sale under the Burkett deed of trust, and secondly of the notes he took from Hunt when the land was sold to the latter. In other words, to lay the Mudd estate liable for the proceeds of those notes, a trust must be established wherein Mudd was the trustee for plaintiff as administrator. Moreover, this trust would necessarily be an express and not a resulting or constructive trust. . . .

An action for money had and received will sometimes lie in favor of a *cestui que trust* against the trustee. (Johnson v. Smith's Admr., 27 Mo. 591; Clifford Banking Co. v. Comm. Co., 195 Mo. 262, 94 S. W. 527; Ziedermann v. Molasky, 118 Mo. App. 106, 94 S. W. 754.) Nevertheless, where the trust is disputed and the amount the trustee owes unsettled, thereby putting in issue other questions than the right of the *cestui que trust* to an ascertained balance from the trustee—where, in short, the trust itself must be established—the remedy ought to be in equity. See for full examination of the subject, Johnson v. Johnson, 120 Mass. 465. Even in instances when, the trust being admitted, an action for money had and received is tolerated, this is done because the action is regarded as equitable in its nature. It is clear to our minds that a mere formal demand presented in the probate court is not the kind of proceeding in which the present controversy, considering the scope of it, can be properly investigated. (Nester v. Ross, Est., 98 Mich. 200). The cited case was a demand

preferred in a court of probate for damages for breach of a contract wherein the decedent had agreed to sell timber lands, or to manufacture the timber on the lands, and from the proceeds pay certain debts of the plaintiff Nester; and after said debts were paid and expenses, the remainder of the lands and timber were to be divided in common by the parties. It was held the contract was not only security for the debts to be paid out of the proceeds of the lands and timber, but that it also created a trust in favor of the claimant Nester and the only forum competent to settle the rights of the parties was a court of equity. While the facts of that case are not identical with those at bar, they are sufficiently analogous for the opinion to shed light on the question of law we are to decide and point to the correct decision. Quite in point is Norton v. Ray, Excx., 129 Mass. 230, where it appeared the defendant's testator, Isaac C. Ray, bought at a sale a dwelling house for the plaintiff at the latter's request and with his money and had taken a deed in the name of himself, Isaac C. Ray, but had afterward signed a paper acknowledging the purchase was for Norton's benefit, and that the premises were held for and would be conveyed to the latter upon request. Ray conveyed to Norton's wife, who lived apart from Norton, and the action was against Ray's estate for the value of the premises. There, though the trust was not disputed, it was held the only remedy was in equity; that an action for money had and received would not lie; citing Johnson v. Johnson, 120 Mass. 465. In point, too, is Davis' Admr. v. Coburn, 128 Mass. 377, where the plaintiff's decedent had sent nine hundred dollars to the defendant to keep and invest for the decedent, and that the defendant received the money and kept it in his own name, but mingled it with his own money. It appeared no account had been rendered of the trust and no settlement of the amount due under it had been made. The court said that under those circumstances the remedy was by bill in equity, as an action at law will not lie in favor of a *cestui que trust* against the trustee while the trust remained open.

GUN v. BARROW.

(Supreme Court of Alabama, 1850, 17 Ala. 743.)

DARGAN, C. J. This was an action, brought by the plaintiff against the defendant in error, to recover four slaves. Upon the trial a bill

of exceptions was sealed by the presiding judge, which shows that the plaintiff, to prove title in himself, introduced a deed of trust, bearing date 24th day of January 1848, which was executed by Larkin R. Gunn, and which purported to convey the slaves in controversy to the plaintiff, upon the trusts that he would apply the proceeds arising from the work and employment of said slaves, to the support and maintenance of Nancy E. Barrow, during her natural life, and in the event that she should have a child or children, the said slaves and their increase, at her death, should descend to such child or children, in equal proportions. . . . The deed then declared that it was the intention of the donor that Nancy E. Barrow should have a life estate in the slaves for her own separate use, free from the charge or alienation of her husband, James H. Barrow, with remainder to the child or children of the said Nancy, and if she should die, leaving no child or children, then the remainder over as before designated. It was shown that Nancy E. Barrow, was the daughter of the grantor, and that, at the time of the intermarriage between her and the defendant, the slaves belonged to the donor. It also appeared that Nancy E. was still living and had children. It was also shown that the slaves went into the possession of the defendant before the execution of the deed, but it was proved by the testimony of the donor and his wife, that the defendant received the slaves with the understanding that the donor should execute a deed of them of similar import to the one read in evidence. . . .

If the property passed by the deed, it is then clear that the legal title vested in the plaintiff as trustee, and still remains in him, for the purpose of executing the trust, and at law, he must recover against any one, who withholds the possession from him. Even if we were to presume, that the husband's possession was that of the wife, or that he held the slaves for her, he could not resist a recovery; for so long as the legal title remains in the trustee, the trusts not being executed, he may recover at law against his own *cestui que trust,* unless the instrument, by which the trusts were created, contain a stipulation that the possession shall remain with the *cestui que trust.* We have said this much upon the supposition that the court was influenced in refusing some of the charges requested, by the idea that the possession of the husband must be considered as the possession of the wife, and that the trustee could not recover against her; but, so far as we can

discover from the record, the defendant set up title in himself, irrespective of the right of his wife. In either aspect of the case, if the deed conveyed the title to the plaintiff, he was entitled to recover, for the trust not being executed, the legal title must still remain in him. . . .

COX v. WALKER.

(Supreme Court of Maine, 1847, 26 Me. 504.)

TRESPASS quare clausum, originally commenced before a justice of the peace. As the writ was, when the action was commenced, there was no allusion in the declaration or writ, to the plaintiff's bringing the suit in any other character, or capacity, than his own. While the action was pending in the District Court, the plaintiff, by leave of Court, amended his writ by adding after the plaintiff's name in the declaration, these words, "as minister of the first Baptist society in Kennebunk." The defendants were Tobias Walker, Israel Taylor and Jamin Smith. . . .

TENNEY, J. This is an action of trespass, quare clausum fregit, brought by the plaintiff as the minister of the First Baptist Society in Kennebunk and for their use. . . . In a second plea, as to the acts admitted to have been done, the defendants say, that the close was conveyed by the deed of George Taylor, dated October 20, 1835, to two of the defendants and others, therein named, to be held in trust for the First Baptist Society of Kennebunk, for the use and support of a minister of the Baptist denomination, and that the said two defendants, for themselves and the other surviving trustees named in the deed, and the other defendant as their servant, did the acts complained of and admitted by the defendant to have been done, as they might fully and lawfully do. To this plea the plaintiff replied, that when the alleged trespass was committed, he was the minister of the First Baptist Society of Kennebunk and in the possession and improvement of the premises described, as such minister, and by virtue of a lease from a committee of said society, they being also three of the trustees mentioned in the deed of George Taylor, and tendered an issue to the country, which was joined by the defendants. . . .

In trespass upon land, conveyed in trust, the trustees can maintain an action; but if the cestui que trust be in actual possession, he should be the plaintiff, though it is otherwise in ejectment. 1 Chitty's Pleadings, 49. An action can be maintained by a corporation, legally existing for any invasion of their rights in real estate, in the same manner that it could be done by an individual who should be the owner. But one who is neither trustee nor cestui que trust cannot maintain an action in his own name for the use of one or the other.

Assuming that the plaintiff was the minister of the society named in the deed, which is the cestui que trust, he cannot by virtue of that relation alone sustain the action for the use of that society, the minister not being, according to the terms of the deed, either trustee or cestui que trust. . . .

CLAYTON v. ROE.

(Supreme Court of North Carolina, 1882, 87 N. C. 106.)

SMITH, C. J. . . . It is conceded that where the right of entry is barred and the right of action lost by the trustee or person holding the legal estate, through an adverse occupation, the *cestui que trust* is also concluded from asserting a claim to the land. Lewin on Trusts, marginal page 604; Herndon v. Pratt, 6 Jones Eq. 327. And the correlative must be accepted that when the trustee is not barred, neither can the *cestui que trust* be, since as against strangers they are identified in interest. The alleged hostile possession by the defendant began after the death of the original trustee and when the legal state had descended, clothed with the trust to his infant children, and this disability prevents the statute from starting to run to their prejudice. This is true if the former statute governs (rev. Code, ch. 65, § 1,) or the substituted limitations contained in the Code. In both there is a saving of the rights of infants. C. C. P. § 27. . . .

EWING v. SHANNAHAN.

(Supreme Court of Missouri, 1892, 113 Mo. 188, 20 S. W. 1165.)

BLACK, J. This is an action of ejectment for a lot in the city of St. Louis. The answer is a general denial and a plea of the statute of limitations. . . .

In the case now in hand the plaintiff took an equitable contingent remainder by force and effect of the deed of trust. Until the death of the donor, the entire legal title, a title in fee simple, was vested in the trustee. It was the duty of the trustee to protect the title for those who should take upon the death of the donor as well as for the donor during his life. To this end the entire legal title was vested in the trustee, and the right of possession was in him. As the trustee held the legal fee simple title and the right of possession for all of the beneficiaries, he was the proper person to sue for possession; and we think the case comes within the rule, that, where the trustee is barred by lapse of time, the beneficiaries are also barred, and that too, though the beneficiaries are minors. That which bars the legal title here bars the equitable title. The acceptance of a trust like this is not a meaningless affair, and, if the trustee has made breach of the trust and wronged the plaintiff, the remedy is against the trustee. The statute of limitations is one of repose, and should be applied in this case. . .

Our conclusion is that the statute began to run against both the legal and equitable title when defendant took possession; that the legal and equitable titles were both barred by ten years adverse possession, and this too though the owner of the equitable title was, during all that time, an infant. That defendant's possession has been adverse, and that too for a period of twenty years, cannot be questioned. . . .

ELLIOTT v. LANDIS MACHINE CO.

(Supreme Court of Missouri, 1911, 236 Mo. 546, 139 S. W. 356.)

GRAVES, P. J. Plaintiffs state that their suit is one in equity to declare a trust and to compel an accounting. . . .

In the case at bar we have a trustee conveying the legal title directly to the parties sued as defendants. Not only so, but such defendants had knowledge of the trust. They had been parties to the creation of the trust. The question that we have to decide, is, can the Statute of Limitations be successfully invoked against the beneficiaries under disabilities, because it has fully run against a trustee who has conveyed the legal title to the parties sued by the beneficiaries, when such parties had full knowledge of the trust? This state of facts has not been adjudicated by this court. The case law is not a unit upon the question. We are therefore left free to discuss the question from principle. We start with the doctrine, that one who knowingly takes title to property which is subject to a trust, himself becomes a trustee, *ex maleficio*. If in the case at bar the defendants Fleming and Dobyne knew that Mrs. Landis held this stock in trust, and with that knowledge bought it, then in my judgment they became trustees *ex maleficio*, and would have to account to the beneficiaries of the trust. . . .

In the case of Parker v. Hall, 2 Head, 1. c. 645, the Tennessee court thus speaks: "As to the Statute of Limitations, it can have no operation in the case. When the cause of action accrued, the owners of these slaves were all under the disability of infancy, and one of them was still an infant at the institution of this suit; and upon the principles of Shute v. Wade, 5 Yer. 1, all are saved from the bar. The position that when the trustee is barred all the beneficiaries are barred, though they may be under disability, has no application here. That doctrine only applies where the trustee could sue, but fails to do so, as where a stranger intrudes himself into the trust estate and holds wrongfully, and adversely, both to the trustee and the beneficiaries. In such a case, if the trustee fail to sue and is barred, the beneficiaries, though infants, etc., are also barred. But here, George H. Parker the trustee and owner of the legal estate, had estopped himself from suing by his bill of sale. He had turned against his wards, and united with the defendant in a breach of trust. The wrong was to them, not to him. He could not sue for, or represent them. . . .

To our mind the distinction drawn by the Tennessee court is well taken. In other words, if the trustee by a conveyance undertakes to convey to a purchaser the property stripped of the trust, and such purchaser takes with knowledge of the facts, then beneficiaries under

disability have the right to sue within the statutory period prescribed, after disability has been removed. Such a case is different from one where the trustee has not so acted. It is different from the case of a person having some claim, who takes possession of real estate (trust property) and claims adverse possession, but in which act the trustee has not concurred by overt act. This is the distinction between the case at bar and the Missouri cases relied upon by defendants, and discussed supra. To hold that a trustee can join with a purchaser with notice, and convey the property stripped of the trust, is to open wide the door for fraud as against infant beneficiaries. We cannot subscribe to the doctrine urged by defendants. Its pernicious effects would be endless. Our court has not gone so far up to this date, as the cases cited can be clearly distinguished on the facts.

We, therefore, hold that the cause of action is not barred. . . .

AMERICAN NATIONAL BANK v. FIDELITY & DEPOSIT CO.

(Supreme Court of Georgia, 1907, 129 Ga. 126, 58 S. E. 867.)

In December, 1893, H. C. Tindall and others, owners of all the capital stock of the Macon Hardware Company, hereinafter called the "Hardware Company," a private corporation, filed their petition to a superior court of Bibb county, alleging the insolvency of the Hardware Company, and praying that a receiver be appointed to administer the assets of the corporation for the benefit of its creditors. The Hardware Company and its creditors, including the National Bank and the Exchange Bank, were made parties defendant to this petition. Thereafter the Exchange Bank, the National Bank, and numerous other creditors of the Hardware Company entered their appearance in said suit, set up certain claims against the Hardware Company, and asserted their rights to share in the distribution of its assets. On January 9, 1894, the court passed an order appointing said Tindall permanent receiver of the Hardware Company, and designated certain banks, among them, the Exchange Bank, and the National Bank, as depositories to receive, hold, and disburse the funds of the receivership, "provided that the said banks will pay the customary rates of interest on such deposits at the rate

of 5 per cent. per annum, if left in the banks for six months, and no interest to be charged for the last 30 days prior to said money being checked out; each bank to have 30 days' notice of the intention to check." Said order also provided that "the said receiver is hereby authorized and directed to make his deposits as aforesaid in his name as receiver, and no check shall be drawn against such deposits, except in his name as receiver, countersiged by the judge presiding of this court, except that checks drawn for expenses may be drawn without being countersigned by the judge as aforesaid, but the said checks shall specify for what expenses drawn." The Exchange Bank, the National Bank, and certain other named banks accepted said designation as depositories under the terms of said order. . . .

It is alleged in the petition that the Exchange Bank and the National Bank failed and neglected to comply with the requirements of the aforesaid order of the court, and paid, out of the funds deposited with them, various sums, aggregating $2,901.53 and $475.44, respectively, upon checks signed by "H. C. Tindall, receiver"; that none of said checks had upon them any statement with reference to expenses, and were not countersigned by the judge, as provided in said order; and that the receiver appropriated the money so withdrawn to his own use, and has never accounted for the same. . . .

BECK, J. 1. In the absence of notice or knowledge, a bank cannot question the right of a customer to withdraw a fund, nor refuse the demands of the depositor by check; and it is also true that, if money be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and, in the absence of knowledge or notice to the contrary, the bank would have a right to presume that the trustee would appropriate the money when drawn to a proper use; but it is also true that, if a bank has notice or knowledge that a breach of trust is being committed by the improper withdrawal of funds, it incurs liability, becomes responsible for the wrong done, and may be made to replace the funds which it has been instrumental in diverting. The Supreme Court of Maryland held that a bank, which credited a check to the individual account of a named person, when the check itself stated that it was for "deposit to the credit of" the person named, with the word "trustee" added to his name, was liable for participating in the breach of trust in case of loss ensuing to the trust estate by reason of his drawing out the fund by checks on his personal account. In the case

referred to, the court said: "To deposit to the credit of Henry W. Clagett, trustee, was an explicit notification to the bank that Clagett was not the actual owner of the money. It was an equally explicit instruction to the bank not to place the fund to the credit of Clagett's personal account. . . . Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit; and, if loss ensued by reason of Clagett drawing the fund out by check on his personal account, the bank is liable to make restitution to the trust estate. The bank, in the eye of the law, participated in the breach of trust of which Clagett was guilty." Duckett v. Nat. Bank, 86 Md. 403, 38 Atl. 983, 39 L. R. A. 89, 63 Am. St. Rep. 513, citing Bundy v. Monticello, 84 Ind. 119. "If the bank participates with the trustee in a misappropriation of the funds, or knowingly permits such misappropriation to take place, it must answer to the beneficiary for loss thereby occasioned." 3 Am. & Eng. Enc. Law (2nd ed.) 832. See, also, cases cited supporting the text.

Much stronger is the reason for holding, in the case at bar, that the bank participated in the breach of trust, than in the case of Duckett v. Nat. Bank, supra. It was agreed in this latter case, in behalf of the bank, that if the bank had obeyed the direction given to it, and had opened an account with Clagett (the depositor) as trustee, still Clagett could have withdrawn the funds on checks appropriately signed, and could then have misapplied the money without involving the bank. But in the case at bar Tindall, the receiver, could not by checks, however appropriately signed by himself, unless they were also countersigned by the judge, have withdrawn the funds. Such were the express terms of the order or decree. The defendants knew the provisions made in the decree as to the manner in which checks, except checks for expenses, should be signed. They knew that they were depositories of trust funds, for the safeguarding of which extraordinary care and caution was being exercised by the court. We do not know by the use of what terms of direction, in a decree or order for the deposit of funds in a designated bank, more emphatic notification could have been given this defendant that payment upon any check, not countersigned as prescribed in this order, would amount to an aiding of a trustee in the misapplication of the funds. By the improper withdrawal of the funds Tindall was clearly guilty of a breach

of trust. The bank had knowledge of this breach of trust, knowing, as it did, the express terms upon which Tindall might check out the money—terms which, so far as affect the sum now sued for, were plainly violated. Having the knowledge that a breach of trust was being committed, by payment of the checks improperly drawn and not countersigned by the judge of the superior court, it aided in that breach, and in the consequent misapplication of the funds; and, having done so, it became liable to the beneficiaries of the trust—that is, to the creditors of the Macon Hardware Company, to whom Tindall sustained a fiduciary relation. . . .

TURNER v. HOYLE.

(Supreme Court of Missouri, 1888, 95 Mo. 337, 8 S. W. 157.)

BRACE, J. . . . That the promissory note pledged by Jamison as collateral security for the loan which defendant made him and for which he executed his individual note to the defendant was a part of the trust fund, that the plaintiff is the trustee of that fund, that the money obtained by Jamison was not applied to any of the purposes of the trust, but to his own use, is undisputed. But it is contended that the instrument creating the trust having conferred upon the trustee the power to change the character of the fund, the trustees had power to sell or vary the securities and in hypothecating the note as he did he conferred upon the defendant a perfect title, and could do so although the defendant may have known that the note was trust property. This point was not overlooked by the learned judge before whom the case was tried below, who furnishes an answer to this contention in the following language: "When a trustee with power to change investments, and professing to act on behalf and for the trust estate, induces a third person to buy from him trust property, or to advance upon it, the third persons acting in good faith will acquire a good title although the trustee convert the proceeds of the sale or advance to his own use. The third party acting under the circumstances stated, is not bound to see to it, that the proceeds of his purchase or advance are properly applied by the trustee. But this rule has no application when the trustee is not professing to act for or on behalf of the trust estate,

or the third party is not dealing with him in good faith, believing that the trustee is making the sale or getting the advance on behalf of the trust estate. In the case at bar the evidence shows that Jamison solicited Hoyle to make him a short loan upon good collateral. He did not mention the trust; he did not ask for a loan on behalf of the trust; he asked it for himself individually, and the loan was made to him individually. On the face of the transaction it was a clear case of the conversion by Jamison of a trust asset, for his individual purposes, and later developments proved that it was nothing else. Under these circumstances it would seem very clear that Hoyle cannot assert any title as against the present trustee if he took the note with notice that it was part of the trust property, or was chargeable with notice of that fact." . . .

SHOE & LEATHER NATIONAL BANK V. DIX.

(Supreme Court of Massachusetts, 1877, 123 Mass. 148.)

Contract against the makers of the following instrument:

"February 16, 1871, $53,000. For value received, we as trustees but not individually promise to pay to the Boston Water Power Company or order, the sum of fifty-three thousand dollars in five years from this date, with interest to be paid semi-annually, at the rate of seven per centum per annum, during said term, and for further time as said principal sum or any part thereof shall remain unpaid.

"Signed in presence of P. H. Sears.

Geo. P. Sanger,
Joseph Dix,
R. A. Ballou,
} Trustees

"Secured by mortgage of real estate in Boston, duly stamped, to be recorded in Suffolk Registry of Deeds." . . .

Prior to February 16, 1871, there existed a private association of persons who agreed to act in concert together in purchasing real estate in this and the adjacent counties. This association made the defendants, who, with other persons, were then members thereof, its trustees to effect such purchases of real estate, with powers and duties concerning the same, substantially as set forth in the deed hereinafter

mentioned. On February 16, 1871, the association, through its said trustees, caused a purchase of property from the Boston Water Power Company to be effected, and the conveyance to be made to the defendants, "as they are trustees for the Brookline Avenue Associates as hereinafter set forth." "To have and to hold the granted premises, with all the privileges, easements and appurtenances thereto belonging, to the said Sanger, Dix and Ballou, as joint tenants and not as tenants in common, and to their heirs and assigns and to the survivor of them and his heirs and assigns forever, in trust nevertheless for the Brookline Avenue Associates for the following purposes: to take, hold, mortgage, lease, manage and improve the same according to the exercise of their best discretion, with full power in the trustees or trustee for the time being, in the exercise of such discretion, to sell at public or private sale any portion or the whole of the real estate hereby conveyed, and to make, execute and deliver good and sufficient deeds to convey the same in fee simple free from the trusts hereby created." . . .

AMES, J. The question whether the defendants have made themselves personally responsible must be determined by the terms of the note itself. In determining the proper interpretation of any written contract, the court will give full effect to all the terms in which it is expressed. Those terms will not be modified by extrinsic evidence tending to show that the real intention of the parties was something different from what the language imports. They will be taken in their plain, ordinary and popular sense, except where it may be qualified by some special usage, or where the context evidently shows that the parties in some particular case had a different intent. It is no part of the business of the court to make or alter a contract for the parties. Even if it be found that the contract, according to its true meaning, has no legal validity, or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law. Sedgwick J., in Sumner v.

Williams, 8 Mass. 162, 184. In a question as to the meaning of a contract, the want of apt words to create a personal responsibility is not to be supplied by the alteration or enlargement of its terms.

In applying these familiar and elementary rules of construction to the case now before us, we find that the defendants promised "as trustees but not individually." The construction contended for by the plaintiffs would require us to strike out the words "but not individually;" although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

It is to be borne in mind that this was not a case of agents acting for an undisclosed or unknown principal, and is, therefore, readily distinguishable from Winsor v. Griggs, 5 Cush. 210, and cases of that class. Neither was it an attempt by the defendants to bind property over which they had no legal control. By the terms of the deed they had power to mortgage, lease and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. In this respect the case differs from Thacher v. Dinsmore, 5 Mass. 299, Forster v. Fuller, 6 Mass. 58, and other cases of that class, in which a party promising "as guardian," etc. was held to have made himself personably liable.

Neither can it be said that the term "trustees" was used as "a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency." In this respect the case differs from Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101. It often has happened that an agent for another person, or the treasurer of a corporation, has made himself personally responsible, by the form of the words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. Cases in which this question has been raised have often been before this and other courts, and the authorities have recently been collected and reviewed in several of our own decisions. See Slawson v. Loring, 5 Allen, 340; Barlow v. Lee Congregational Society, 8 Allen, 460; Tucker Manuf. Co. v. Fairbanks, *ubi supra*. But we believe no case can be found in which a promise "as trustee," &c., accompanied with an express disclaimer of personal liability, would fail to exempt him.

It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves, we need not decide whether they have or have not bound their principals. Abbey v. Chase, 6 Cush. 54. But, even if the written contract should fail of taking effect as a negotiable note, it might still be operative as an acknowledgment of unpaid debt, which the mortgage was intended to secure. It may be that this was all that the original parties intended, or supposed to be material. They may have considered the mortgage sufficient security, without the personal responsibility of the trustees.

Our conclusion therefore is that, without proof that the defendants, as trustees, have funds of the association in their hands appliable to this debt, no action can be maintained against them. No evidence to that effect having been offered, we must order, judgment for the defendants.

SECTION IV. RESULTING AND CONSTRUCTIVE TRUSTS

ACKER v. PRIEST.

(Supreme Court of Iowa, 1894, 92 Iowa, 610, 61 N. W. 235.)

DEEMER, J. The plaintiffs in the equity suit are the heirs at law of Elizabeth Priest, deceased, and the defendant Stephen C. Priest is their father. Mrs. Priest was a daughter of one Joseph Abrams. Joseph Abrams had one son and three daughters, besides Mrs. Priest. In the month of July, 1884, Abrams, who was then living in the state of Kansas, concluded to make a partial distribution and advancement of his property to his children. He was then the owner of two farms in Kansas, one of which was known as his "Home Farm," and the other was occupied by defendant Priest and his family. Thomas W. King, another son-in-law, owned and occupied another and a third farm in the same county as the other two. In order to carry out his

purpose, and make an equal distribution of property to his daughters, Abrams made arrangements with King to exchange the "home farm," valued at eight thousand dollars, for the King place, at the agreed price of four thousand dollars. Prior thereto, however, Abrams had had a conversation with defendant Priest, in which he told him he intended to give him a farm. After making arrangements with King, Abrams informed defendant that he had an opportunity to trade the "home farm" for King's land and directed defendant to go and look at the farm, and if it suited him he (Abrams) would make the exchange. Defendant, after examining the place, was pleased with it, and so informed Abrams, and Abrams made the contemplated exchange. Abrams deeded the home farm to King, and King, by direction of Abrams, and with the knowledge, direction, and consent of the deceased, Mrs. Priest, made a deed to his place to the defendant Priest. This last deed was a warranty deed, in the usual form and for the expressed consideration of four thousand dollars. Shortly after the making of these deeds, the defendant moved onto the King farm and used and occupied it for a year or more, when he sold it, and with the proceeds purchased a farm in Cass county, Iowa, from one Isabella Goodale. The deed to the Cass county land was taken in the name of the defendant with the knowledge and consent of his wife. Defendant and his wife immediately took possession of the Cass county land, and occupied and used the same until the death of the wife, in April, 1888. After the death of the wife, and in May 1891, the defendant sold the land in Cass county, and at the time of the commencement of this suit was in possession of a large part of the proceeds of the sale. Plaintiffs claim that the defendant at all times had the title to the Kansas land and to the land in Cass county in trust for his wife, Elizabeth V. Priest, and that they, as her heirs at law, are entitled to have a trust impressed upon the funds now in the hands of the defendant, arising out of the sale of the Cass county land. Defendant Isaac Dickerson was made a party to the suit because of his having possession of some of the funds arising from the sale of the land in this state. . . .

Plaintiffs do not—nor, indeed, could they, under the statutes of either Kansas or of this state—claim an express trust in the fund, or the proceeds thereof. Their claim is that from the transaction between the parties, as proved, there arose an implied, a resulting, or a constructive trust, which the law will recognize and enforce. We turn,

then, to the evidence, and find that while it was the intention of Abrams to make a partial distribution of his estate among his heirs, yet it did not appear to him to be important to whom he made the deeds—whether to his daughters, in their own names, or to their husbands. The deed to the home farm was made to King, the husband of one of his daughters, and the deed to the King farm was made direct to defendant Priest. Abrams had previously spoken to defendant about giving him a farm, and while the deed was, no doubt, made so as to place all his children on an equality, it is quite evident to us that it was wholly immaterial to him to whom the deed should be made. Before having the deed made to defendant, Abrams spoke to his daughter, Mrs. Priest, about how the deed should be made, and "she said to make it to her husband; it was all the same." Again, Abrams testifies, "My daughter gave no reason (for making the deed to her husband), except that it would be all right, recognizing him as her husband." Even if Abrams intended the deed to be for the benefit of Mrs. Priest and her children, as he says, he did not so state to defendant, and defendant had no knowledge but that he was to take the beneficial as well as the legal estate. Abrams directed King to make the deed to defendant, and King had no conservation whatever with defendant.

Applying these facts to the statutes of Kansas, before quoted,[1] with reference to the creation of trusts, and it is clear that defendant took an absolute title to the land deeded him by King, unincumbered with any trust. It is contended, however, that the laws of Kansas have no application to this case, that the statutes above quoted relate simply to the remedy, and that the *lex fori* governs. Without deciding this question, so far as it relates to the statute of frauds, for it is not necessary to a determination of the case, and passing it with the single remark that where the statute relates simply to the remedy, and does not make the parol contract void, as is the case with the statute in question, there is much force in appellants' position, we are clearly of the opinion, however, that the other statutes with reference to the creation of trust estates are binding, for they go to the validity and

[1] Gen. W. Kan. 1868, c. 114, § 6; When a conveyance for a valuable consideration is made to one person, and the consideration thereof paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections.

operation of the contract, and of the alleged trust in the land. It is familiar doctrine that the law of the place where the contract is made is to govern as to its nature, validity, obligation, and interpretation, and the law of the forum as to the remedy. Bank v. Donnally, 8 Pet. 361; Scudder v. Bank, 91 U. S. 406; Burchard v. Dunbar, 82 Ill. 450. It is also everywhere acknowledged that the title and disposition of real property are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. Korr v. Moon, 9 Wheat. 565; McCormick v. Sullivant, 10 Wheat. 196. And a title or right in or to real estate can be acquired, enforced, or lost only according to the law of the place where such property is situated. Benttely v. Whittemore, 18 N. J. Eq. 373; Hosford v. Nichols, 1 Paige, 220; Williams v. Maus, 6 Watts, 278; Wills v. Cooper, 2 Ohio, 124.

If we are correct in our premises, it necessarily follows, as a conclusion, that under the laws of Kansas there was no trust created by law in the Kansas land, even if it be said that Mrs. Priest furnished the consideration paid for the land, because there was no agreement on the part of the defendant that he should hold the title in trust for his wife. . . .

LONG v. MECHEM.

(Supreme Court of Alabama, 1904, 142 Ala. 405, 38 So. 262.)

SIMPSON, J. This is an appeal from an interlocutory decree overruling demurrers and a plea. The original bill was filed to remove a cloud from the title of complainant, and was afterwards amended by adding a section setting up a resulting trust, but making no additional prayer.

The first assignment of error is based on the overruling of the plea; the substance of the plea being that the trust set up in the amended bill was not in writing, and consequently void, under section 1041 of the Code of Alabama of 1896. The allegations of the amended bill show that the land in question was bought and paid for by the complainant, and the title taken in the name of one Duncan, under an agreement that Duncan was to hold the legal title for complainant, and to convey the land, whenever desired, under complainant's direc-

tion. The contention of the respondent is that the fact that there was a parol agreement in regard to said trust takes it out of the category of resulting trusts, and that it is therefore void. If the complainant had a resulting trust in the lands, from having paid the purchase money and placed the title in the name of another, the mere fact that the party in whom the legal title was vested recognized by parol the obligation to hold the land in trust certainly could not destroy the resulting trust held by the complainant by operation of law. In addition to this, the section of the Code provides that no trust in lands not in writing is valid, "except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law." The inevitable result from the grammatical construction of the sentence is that this class of trusts is excepted entirely from the operation of the section, and parol declarations of the parties regarding the same are admissible. The distinction between this case and such cases as Patton v. Beecher et al., 62 Ala. 579, and Brock v. Brock, 90 Ala. 86, 8 South 11, 9 L. R. A. 287, is that these cases correctly hold that the "mere verbal promise by the grantee of a deed for land, absolute on its face," will not take it out of the requirements of the statute, while this case comes under another principle of law, equally well established, and recognized in the exception contained in the statute under consideration, to wit, that "if the purchaser of lands, paying the purchase money, takes the conveyance in the name of another, the trust of the lands results by construction to him from whom the purchase money moves." Lehman et al v. Lewis, 62 Ala. 129, 131; Tillman v. Murrell et al., 120 Ala. 239, 24 South, 712. It is true that in the last-named case, as counsel for appellant say, the lands had been conveyed in accordance with the parol agreement; but the case was decided distinctly on the principle that Murrell held the legal title in trust for the party who paid the money for it, "not by virtue of the parol agreement, but because of their having paid the consideration." . . .

ROSSOW v. PETERS.

(Supreme Court of Illinois, 1917, 277 Ill., 436, 115 N. E. 524.)

FARMER, J. This is a bill in chancery filed by John Rossow to declare him to be the equitable owner of a house and lot in Chebanse,

Illinois, and to compel the defendant William G. Peters, who held the legal title, to convey the premises to complainant. The bill was filed in October, 1915. Rossow died in January, 1916, before the cause was heard, leaving a last will and testament, making his widow, Sophia M. Rossow, sole beneficiary and executrix of his will. After his death she was substituted as party complainant.

John Rossow was the father-in-law of Peters, whose wife was Rossow's only child. At the time of his death Rossow was seventy or more years of age. He was an ignorant, illiterate man and for some years had been an employee of his son-in-law. In March, 1906, he contracted for the purchase of a house and lot in Chebanse for a consideration of $1300 and paid $100 in cash. He and his wife moved into the property before the deed was made, March 17, 1906. He lived in the property with his wife until her death and continued to occupy it until August, 1914, when he married again and went to live in property owned by his wife. The bill alleges that the deed to the property Rossow purchased was made to his son-in-law without Rossow's knowledge. This is denied by the answer. The defense set up by the ansewer is that Rossow had creditors, and that he had the deed made to his son-in-law to defraud his creditors. . . . The only creditor the proof tended to show Rossow had was a man named Steifel, to whom he owed $200, and Rossow testified he paid him off some years before his deposition was taken.

If it be conceded that it was proven by competent testimony that Rossow said he had the deed made to Peters to hinder and delay his creditors, was it, in fact, a fraud? The bill alleged, and the proof sustains the allegation, that Rossow resided in the property as his homestead from about the first of March, 1906, (which was before the deed was made,) until August, 1914, and that since leaving it he had collected the rents from it. He paid all taxes and assessments against the property from the time he bought it and at his own expense made all necessary repairs. He was entitled to a homestead to the extent in value of $1000, which creditors could not take from him. He only put $900 cash into the property at the time he bought it. A homestead of the value of $1000 is exempt from sale for the payment of debts, and the owner of it may convey it without interference from his creditors. When the deed was made Rossow's interest was not liable to creditors, and if Rossow had taken the title in his own name he

could have conveyed it free from their interference. Whatever he may have thought about it, he did not defraud creditors by having the deed made to Peters.

Cases involving conveyances made to defraud or hinder and delay creditors have usually been suits begun by the creditor, and in all such cases it has been held a conveyance of property exempt from the payment of debts is not fraudulent as to creditors. A creditor has no interest in the disposition of such property and is not hindered or delayed by its conveyance. Washburn v. Goodheart, 88 Ill. 229; Moore v. Flynn, 135 id. 74; Nance v. Nance, 5 Am. St. Rep. 378; Bogan v. Cleveland, 20 id. 158.) Even the fraudulent acts of the party entitled to a homestead are not allowed to divest that right. (Gruhn v. Richardson, 128 Ill. 178.) That can only be accomplished in the manner provided by statute. (Leupold v. Krause, 95 Ill. 440; Hamby v. Lane, 89 Am. St. Rep. 967.) "A debtor, in the disposition of his property, can commit a fraud upon his creditors only by disposing of such of his property as the creditors may have the legal right to look to for the satisfaction of their claims, and therefore a debtor cannot commit a fraud upon his creditors by disposing of his homestead." (20 Cyc. 385.) The most that can be claimed for the proof here is, that Rossow had one creditor to whom he owed $200 at the time and that he had the property conveyed to his son-in-law for that reason. The property, at the time of the conveyance, being exempt from the claim of creditors, they had no interest in it and were in no way injured or defrauded by it.

It may be said Rossow intended by the conveyance to defraud his creditor, and although that was not its effect he cannot compel a reconveyance. In other words, that a conveyance made with intent to defraud creditors, although the conveyance was of property exempt from the claims of creditors, and was therefore no fraud upon them, can no more be set aside and the grantor invested with the title than if the transaction had operated to defraud or hinder and delay creditors. On this question the cases are conflicting. "Some decisions hold that such conveyance is fraudulent and the property cannot be recovered by the grantor, while others hold that since none is harmed but the grantor it should not be deemed a fraudulent conveyance and he should be permitted to recover the property so conveyed." (12 R. C. L. 611.) The decisions will be found collected in a note to Carson v. Beliles,

1 L. R. A. (N. S.) 1007. As to a debtor's homestead there are no creditors and there can be no fraudulent disposition of it. (Ferguson v. Little Rock Trust Co. 99 Ark. 45; Ann. Cas. 1913a, 960.) The obvious reasons for this rule against the grantor attacking a conveyance made by him in fraud of the rights of creditors do not obtain where no creditors or third persons are injured or defrauded, and under the circumstances of this case as disclosed by the proof we think the rule cannot be invoked against the relief prayed for in the bill. . . .

McDONOUGH v. O'NIEL.

(Supreme Court of Massachusetts, 1873, 113 Mass. 92.)

GRAY, C. J. The decision of this case depends upon the application to the evidence of well settled rules of equity jurisprudence.

Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the statute of frauds. It is sufficient if the purchase money was lent to him by the grantee, provided the loan is clearly proved. And the grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase money, by reason of such a loan or otherwise, was the money of the alleged cestui que trust. Kendall v. Mann, 11 Allen, 15 Blodgett v. Hildreth, 103 Mass. 484. Jackson v. Stevens, 108 Mass. 94. In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly. Campbell v. Dearborn, 109 Mass. 130. The findings of a master in matters of fact are not to be reviewed by the court, unless clearly shown to be erroneous. Dean v. Emerson, 102 Mass. 480. And in equity, as at law, the omission of a party to testify in control or explanation of testimony given by others in his presence is a proper subject of consideration. Whitney v. Bayley, 4 Allen, 173.

It appears and is not controverted that the deed was made by Godfrey to the defendant, whose wife was the testator's sister: that the purchase money $3000, of which the testator furnished $300 of his own money, and $200 borrowed by him of Mrs. McGovern, upon a note signed by himself and the defendant; the defendant furnished

$600 of his own money, and $400 borrowed of Dolan upon the defendant's note; and for the remaining $1500 the defendant gave his own note, secured by mortgage on the premises, to Clements, who held a previous mortgage for a like amount, and who testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterward did, in discharge of the old one. The will recites that the defendant held a deed of certain real estate in trust for the testator's benefit, and had paid certain sums of money on his account, and directs that all such sums of money, with interest, should be paid back to him, and he should then convey the property in fee to the testator's wife. The attorney who drew the will certifies that he read this part of it in the testator's presence, and before its execution, to the defendant, and asked him if it was right, and he said it was, and upon being asked what claims he had against the place, answered $600, besides $100 for repairs and $44.08 for taxes, and that he had received from the testator the whole amount with interest of the note to Dolan, except $80, and that the testator had paid the note to Mrs. McGovern. The other material testimony may be taken as stated on the defendant's brief, namely, that the defendant repeatedly "admitted that he bought the place for John B. McDonough and that he meant to assist or help him;" that "the defendant said McDonough wanted him to buy the place for him," "that he had always wanted John to take the deed, but he had not paid up;" and "that he was ready to fix up the place when McDonough was ready to pay up." The master also reports that the defendant was present at the hearing before him but did not offer to testify.

From this evidence the master, who heard all the witnessess, was warranted in finding as matter of fact that the money paid by the defendant for the land was lent by him to the plaintiff for the purpose, and that thus the whole purchase money was the plaintiff's money. Upon examination of the whole evidence, we see no sufficient cause for reversing the conclusion of the master, and taking the facts as found by him; the inference of law follows that there was a resulting trust in favor of the testator, and that there must be a decree for the plaintiff.

CARTWRIGHT v. WISE.

(Supreme Court of Illinois, 1853, 14 Ill. 417.)

CATON, J. . . . The question then arises, whether a father, who purchases land with his own money, and takes the title to his idiot son, can file a bill for a resulting trust, and claim that he did not intend it for the benefit of his son, but for his own use? We are prepared to say that such a bill cannot be sustained. It must be held to be an advancement in favor of the child, (Taylor v. Taylor, 4 Gil. R. 304; Bay v. Cook, 31 Ill. R. 345.). The policy of the law requires that such advancement thus made to such a party, should be held to be irrevocable by the father. A contrary rule would open too wide a door for the revocation of advancements to those who have such a peculiar claim upon the bounty and protection of a father. The very idea of selecting an idiot for a trustee, is absurd. He must be incapable of executing or discharging any duty in relation to it; and the very suggestion indicates insanity, or a contemplated fraud on the part of the father.

Let the decree be affirmed.

HALL v. HALL.

(Supreme Court of Missouri, 1891, 107 Mo. 101, 17 S. W. 811.)

MACFARLANE, J. The petition contains two counts. The first is ejectment to recover about twenty-eight acres of land in Andrew county. The second is in equity, in which plaintiff alleges that defendant is his father, and on the sixth day of January, 1866, plaintiff was an infant living with him and in his family; that on said day one Beecraft conveyed to plaintiff the land in controversy by good and sufficient deed, which was delivered to defendant, who took the same into his possession to keep and hold for plaintiff; that afterwards defendant fraudulently, and without the knowledge or consent of plaintiff, erased the name of plaintiff as grantee therein and inserted

his own, and had the deed as so changed, recorded; that the deed, as recorded, constituted a cloud upon plaintiff's title. The prayer was that the cloud be removed and plaintiff's title be decreed.

The answer was a general denial, and a special defense in which it was set up that defendant paid the full amount of the purchase price for the land, a part of which belonged to his brother, Jesse Hall who was then absent from the state; that he bought the land for his own use and benefit; that he had lived on it, making it his home from the date of the purchase to the present time; that at the time of purchasing the land plaintiff was an infant, under two years of age, paid no part of the purchase money, and no deed was made to him or for his benefit. The case was tried to the court without a jury.

The evidence shows a state of facts that do not commend plaintiff for his filial regard for his father. It shows that for some years prior to the date of this deed defendant had lived on this small tract of land presumably as a tenant; that on that day he bought the land from Beecraft, for which he paid him $560, which appears to have been about all his possessions. When the deed was written, defendant directed the writer to insert the name of Jesse Hall as grantee therein. This was done, and the deed delivered to defendant, who retained it until about 1870, when he erased the name Jesse, and inserted instead that of John, thus making himself the grantee. A few years thereafter he had the deed recorded. From the date of the deed in 1866 to the commencement of this suit he occupied and used the land as his homestead, made improvements, and paid the taxes thereon.

These facts are substantially undisputed. Plaintiff testified that prior to 1860, himself and his brother Jesse had worked together dividing the earnings; that his brother left home in 1860, leaving in his hands some property, the proceeds of which constituted a part of the consideration paid for the land, and on that account he had the deed made to him in order to secure this money; that hearing of the previous death of his brother he changed the deed. The evidence, however, that the deed was deliberately made to the plaintiff, then under two years of age, we think greatly preponderated.

The court gave some and refused other declarations of law, but as the defense was equitable the legal questions can be considered without setting out in detail these instructions. The court gave one intended to make the deed to his brother Jesse Hall, the finding should

be for defendant; and refused one asked by the defendant to the effect him. The court also gave a declaration that, if the deed was not made to plaintiff as an advancement, he could not recover. The verdict and judgment were for plaintiff and defendant appealed. . . .

The deed in question was unconditional in its terms, and, at the time it was executed and given into the hands of defendant, plaintiff was less than two years of age, and was wholly without discretion, either to accept or reject it. Under such circumstances the deed being declaration of law to the effect that, if the defendant at the time beneficial to the infant, the rule is almost universal that the acceptance that the evidence failed to show such a delivery of the deed to or for the benefit of plaintiff as was necessary in order to vest the title in will be presumed. . . .

The conclusion being irresistible that the deed was intended, by both the grantor and defendant who paid the purchase money, to operate as a transfer of the title to plaintiff, the next inquiry is whether it operated as a fee-simple conveyance and as an advancement, or was there a resulting trust in favor of defendant. The rule is that where one pays the purchase money, but the title is taken in the name of a stranger, the party taking the legal title will, under certain circumstances, hold the title in trust for him who paid for the land. The presumption of a resulting trust in favor of the purchaser is rebutted in case the conveyance is made, under like circumstances, to one to whom he is under some moral or legal obligation, as wife or child. In such case the conveyance will be taken to have been intended as an advancement. Darrier v. Darrier, 58 Mo. 226; Whitten v. Whitten, 3 Cush. 191; 2 Story, Eq., sec. 1201.

This rebutter of the presumption of a resulting trust, arising from the relation of the parties to each other, will itself be overcome when all the facts and circumstances antecedent to, or contemporaneous with, the transaction point clearly to an intention on the part of the purchaser to create a trust. Darrier v. Darrier, supra; Peer v. Peer, 11 N. J. Eq. 432; Persons v. Persons, 25 N. J. Eq. 250; Taylor v. Taylor, 4 Gilm. 303; Dudley v. Bosworth, 10 Hump. 12; Tremper v. Barton, 18 Ohio, 418. Whether this conveyance carried with it a resulting trust depended altogether upon the intention of defendant when he bought the land, paid the purchase money, and directed the name of plaintiff inserted in the deed as grantee. This intention

can be shown by parol evidence as such trusts are not within the statutes of frauds. See authorities supra.

There are many circumstances which to our minds tend strongly to rebut the presumption that the coveyance in this case was intended as an advancement. So far as appears from the record this was the bulk of the property owned by defendant at the time; a part of the money used belonged to his brother; he had lived on this little tract previously, and evidently bought it for a home for himself and family, and no provision was made for his wife or other members of his family. The disposition of all his property for the benefit of one child is not consonant with common sense or common justice. If the conveyance was intended to carry with it a trust in favor of plaintiff it could make but little difference whether the deed was made to brother, or son of defendant. The principal difference would be in the fact that the burden of proof, to establish the trust in the child, would rest upon defendant, while a presumption of a trust would exist if the legal title had been taken in the brother. . . .

It is true a declaration of law was given submitting the question of fact, as to whether the deed was made to plaintiff by direction of defendant, with the intention of having it treated as an advancement, but we think one should also have been given on the hypothesis that the deed created a trust in favor of defendant. The first instruction asked by defendant was doubtless intended to submit that theory of the defense, but omitted the vital and controlling fact as to the intent of the purchaser, and was properly refused. . . .

IN RE DAVIS.

(United States District Court, 1901, 112 Fed. 129.)

LOWELL, D. J. I find the facts in this case, to be as follows: Mrs. Sullivan paid the entire original consideration for the property and since the purchase has paid off mortgages thereon to the amount of $1,600. She never intended to take by the conveyance any title to the property, legal or equitable. Had she so intended, there was nothing to prevent her from substituting her name for her daughter's in the deed as prepared, which could have been done without expense. She

intended the entire equitable estate for her grandchildren's benefit especially for their education. She never intended her daughter to take any beneficial interest in the property. . . . I have to determine whether a trust results in favor of the person paying the consideration when that person distinctly intended that the entire beneficial interest in the property should vest in another not the grantee, and intended that no interest, legal or beneficial, should vest in herself. Where one pays the consideration for real estate and the title is taken in another, a trust in favor of the one paying the consideration is presumed to result. If the grantee is a child, a counter presumption arises. But none of these presumptions are conclusive, and are all controlled by the circumstances of the particular case. . . .

The doctrine of a resulting trust in favor of the person paying the purchase money of an estate is stated in Anonymous, 2 Vent. 361 (in 1 Vern. 366, the case is named Bird v. Blosse):

"Where a man buys land in another's name, and pays the money, it will be in trust for him that pays the money though no deed declaring the trust, for the statute of 29 Car. II., called the 'Statute of Frauds,' doth not extend to trusts raised by operation of law."

A century later Lord Chief Baron Eyre thus explained the doctrine in the opinion of the court of exchequer:

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive,—results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law that, where a feoffment is made without consideration, the use results to the feoffor." Dyer v. Dyer, 2 Cox, 92, 93, 1 White & T. Lead. Cas. Eq. 203, 205.

The trust is presumed to result from the circumstance of payment alone. It results, even if the grantee had no notice of the conveyance, and though he made no agreement, oral or written, to hold the estate in trust. To create the trust, there need be nothing savoring of fraud or misrepresentation or mistake. The trust is not fastened upon the conscience of the legal owner by an action or inaction of his. It arises, as is said in the statute of frauds, by operation of law. The trust may arise in an aliquot part of the property conveyed, or in an estate therein less than a fee simple. The nature and extent of the beneficial interest which passes to the person paying the purchase money may be

shown by parol. The trust in favor of the purchaser which is presumed to result may itself be rebutted by parol.

The trust in favor of the grandchildren which was intended by Mrs. Sullivan is enforceable against Mrs. Davis or it is not. Let us suppose that it cannot be enforced. From the payment of the purchase money by Mrs. Sullivan a trust is presumed to result in her favor. How does the trustee in bankruptcy of Mrs. Davis seek to rebut this presumption? Mrs. Davis is Mrs. Sullivan's daughter and from some relations a rebutting counter presumption arises in favor of the grantee. It is doubtful, however, if this counter presumption arises from the relation of mother and daughter. See Murphy v. Nathans, 46 Pa. 508; Sayre v. Hughes, L. R. 5 Eq. 376; Johnson v. Wyatt, 2 De Gex, J. & S. 18; Bennet v. Bennet, 10 Ch. Div. 474; In re Orme, 50 Law T. (N. S.) 51. In any case the counter presumption in favor of a grantee who is the child of the purchaser even where it exists, "is not a presumption of law, but of fact, and can be overthrown by proof of the real intent of the parties." Institution v. Meech, 169 U. S. 398, 407, 18 Sup. Ct. 396, 400, 42 L. Ed. 793, 798. "The circumstance of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nomiee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence." "Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side." Dyer v. Dyer, above cited. As it is abundantly clear that Mrs. Davis was intended to take no beneficial interest in the estate, her relation to Mrs. Sullivan is unimportant, and the case must be decided as if she were a stranger in blood. The trustee thus stands in the place of a grantee who seeks to rebut the presumption that the trust results to the purchaser, and seeks to do so by showing that a trust was intended in favor of a third person, which trust is not enforceable against the grantee. The grantee thus claims the entire beneficial interest in the estate, of which she would otherwise have taken nothing, by showing that a beneficial interest was intended in some one else. She claims a beneficial interest in property because of the expressed intent that she should take no

beneficial interest therein. If the purchaser had said nothing, the grantee would have taken nothing. Because the purchaser has said that the grantee is to take nothing, the grantee claims to take everything. This does not appear to be equitable. . . .

Again, it is settled that, upon an oral declaration by the purchaser that the grantee is to take the beneficial interest in part of the estate he will do so, and the beneficial interest in the remaining part will pass by way of resulting trust to the purchaser. The expression by the purchaser of an intention that the grantee shall take only a part, causes a trust in the rest of the estate to result. Rider v. Kidder, 10 Ves. 360; Cook v. Patrick, 135 Ill. 499, 26 N. E. 658, 11 L. R. A. 573. Why should a declaration that a grantee is to take nothing defeat the resulting trust, and cause him to take everything? Still again, it is settled that, where a trust is validly declared in only a part of the estate conveyed, the rest of the estate will result to the purchaser; and the like happens where a trust is declared in the whole estate, but fails in part. It is hard to say why the failure of a valid trust, once created, should inure to the benefit of the purchaser, while a failure to create a valid trust inures to the benefit of the grantee. . . . Let us suppose that Mrs. Sullivan had become bankrupt, instead of Mrs. Davis, and that the trustee of Mrs. Sullivan sought to recover the property from Mrs. Davis, while the latter was trying to carry out the intention of Mrs. Sullivan for the benefit of the grandchildren. Even in that case, it must still be said that Mrs. Sullivan's intention was not to rely upon Mrs. Davis' honor, but to impose on her a binding trust. If that intention failed, and if the trust did not bind the grantee, the person paying the purchase money would naturally prefer to take into her disposition the property for which she had paid, rather than to leave it altogether in the disposition of the nominal grantee. If, therefore, the trust in favor of the grandchildren was not validly declared, there was a resulting trust in favor of Mrs. Sullivan. . . .

GLIDEWELL v. SPAUGH.

(Supreme Court of Indiana, 1866, 26 Ind. 319.)

RAY, J. . . . The first section of "an act concerning trusts and powers," (1 G. & H. 651,) provides that "no trust concerning

lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney, thereto lawfully authorized in writing."

The sixth section of the act declares that "when a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." One of those provisions, or rather exceptions named to the rule, is the case made by the evidence offered, to-wit: "Where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase money, or some part thereof." Without the statute, the trust would be implied without proof of the agreement to hold in trust, but under the statute, the trust does not result, unless the express agreement to thus hold be superadded. . . .

CARLL v. EMERY.

(Supreme Court of Massachusetts, 1888, 148 Mass. 32, 18 N. E. 574.)

DEVENS, J. The checks which were indorsed by the plaintiffs to the defendants, for the proceeds of which the defendants agreed to account to them, were so transferred, as the evidence tended to show, with a view to delay and defraud the plaintiffs' creditors, and of this purpose both parties were cognizant. At a subsequent period the plaintiffs went into insolvency, and sought to avail themselves of the property for the purpose of satisfying their creditors to the extent of its value. For this purpose they demanded the proceeds of the checks of the defendants, who were apprised of the intention of the plaintiffs, and of the object to which such proceeds were to be devoted. The defendants having refused this demand, the plaintiffs, who had made an offer of compromise to their creditors, paid into the Court of Insolvency a sum which exhausted all their assets, including the amount of the checks transferred to the defendants' This sum was obtained partly by a loan made to them by one Chase, to whom they

assigned their claim against the defendants for the proceeds of the checks, and for whose benefit this action was brought.

The defendants requested an instruction to the jury, that, if they were satisfied on all the evidence that the checks were transferred to them "in order to prevent the plaintiffs' creditors from reaching the same by attachment or other legal means, or to hinder and delay said creditors in their lawful attempts to avail themselves of said checks or the proceeds thereof in payment of their lawful demands, this action cannot be maintained." This request was refused, and the jury was instructed: "If the jury find that the defendants received those checks to have them cashed for the benefit of the plaintiffs, and received the money therefrom, and the plaintiffs thereafter demanded the same of the defendants for the purpose of paying a composition made in insolvency with their creditors, of which purpose the defendants were apprised, and the defendants refused to pay over said money to the plaintiffs or their order, then this action may be maintained, although the said checks were originally placed in the hands of the defendants for collection, in order to hinder, delay, or defraud creditors."

We have no occasion to consider whether the defendants could have been permitted to defeat the contract they had made by proof that they had participated in a fraud upon the plaintiffs' creditors, or whether the transaction described in the request was not valid between the parties, and thus that it could have been avoided only by creditors, or whether even creditors could have avoided it, having themselves received the proceeds of the checks. All these questions have been repeatedly considered by this court. Knapp v. Lee, 3 Pick, 452; Dyer v. Homer, 22 Pick. 253; Oriental Bank v. Haskins, 3 Met. 332; Crowninshield v. Kettridge, 7 Met 520; Brown v. Thayer, 12 Gray, 1; Harvey v. Varney, 98 Mass. 118.

The instruction as given was sufficiently favorable to the defendants. It was in substance that if one of two parties to a transaction, fraudulent as to creditors, has transferred property to another, no consideration having been paid, he may recede from the transaction on notice to the other party, repossess himself of his property, and devote it to its proper purposes. That a fraudulent transaction may be purged of the fraud by the subsequent action of the parties is well settled. Thus, if the checks transferred to the defendants, had been fully paid for to the

plaintiffs, and the sum had gone to the plaintiffs' creditors, the transaction would have been purged of fraud and the defendants would have had a good title thereto. Thomas v. Goodwin, 12 Mass. 140. Oriental Bank v. Haskins, 3 Met. 332.

It would seem equally clear, that, when a party who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction by reason of such participation should be able to hold the property the possession of which he had so acquired, and thus prevent it from being devoted to its legitimate uses.

Judgment on the verdict.

IN RE WEST.

(Supreme Court of Judicature, (1900) 1 Ch. D. 84.)

KEKEWICH, J. A difficult question arises in this case. The testatrix has given her real and personal property to certain persons as trustees, but the trusts declared do not exhaust the property. The question is what is to be done with the part not required to satisfy the trusts. It is impossible to say that because property is given to persons as trustees they therefore take no beneficial interest. That is contrary to all experience of the construction of wills, there being many instances of trustees taking beneficially. Nevertheless, there is a presumption that a gift in trust is not a beneficial gift. It is, however, not uncommon to find a gift of a fund charged with certain payments, or coupled with a condition that a certain amount be paid to a third person. Whether the charge takes effect by way of trust or condition, it is not intended to do more than give a certain amount out of the fund to another person. There are numerous cases of that kind.

In Croome v. Croome W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814), the Court of Appeals, besides applying the rule, in King v. Denison, 1 V. & B. 260; 12 R. R. 227, to the will

before them, took the opportunity of laying down a rule in their own language.

Cotton, L. J., says (59 L. T. 584, 585): "I think Mr. Theobald has stated the correct rule to be applied in this case, which is, whether this is a devise for a particular purpose—by which I mean for that particular purpose only—or whether it is a devise subject to certain purposes described as trusts or charges. That I think is the rule laid down by Lord Eldon in King v. Denison, 1 V. & B| 260; 12 R. R. 227. What he says is this: 'If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more'—that is to say, exclusively for that purpose—and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir." He means where it is given for the particular purpose only; but where it is given subject to a particular purpose, then what is not required for the purpose of fulfilling that purpose remains to the devisee, it not being imposed on him as a trust or as a charge. It is very true that the charges created by the words of this will do extend till they are satisfied, and charge the whole of the estate, but that, to my mind, is not the question. Now, in construing, we have to see what is the effect of the words—whether they create a devise for a particular purpose only, or a devise subject to the performance of a particular purpose. I think it is the latter." . . .

That is the pith and marrow of the whole matter. Are the donees in trust trustees in respect of the whole property given, or only in respect of the part that is given to others?

I have now to apply that test to the particular will. There is a general devise and bequest to certain persons on trust for sale. Those words alone do not settle the question, as I might still find the trustees were intended to take beneficially. The trust for sale is in the ordi-

nary form, and the donees contend that it is mere machinery. . . . But I cannot look on that trust as mere machinery. It affords a strong indication that they are to hold the proceeds as trustees generally. A somewhat finer point arises on the direction that the trustees shall be chargeable only with such moneys as they actually receive. That clause is unnecessary, unless the testatrix contemplated that the donees were trustees of the whole property given. Then follows the reimbursement clause, shewing that the testatrix contemplated that the trustees might require reimbursement of moneys expended in the execution of their trust. The trust for sale and the indemnity and reimbursement clauses hang together, and show that the testatrix was contemplating a complete trust. This excludes the notion of the trustees taking beneficially. . . .

VAN DER VOLGEN v. YATES.

(New York Court of Appeals, 1853, 9 N. Y. 219.)

On the 27th of April, 1790, Nicholas Van der Volgen owned a lot in Schenectady, the land out of which this controversy arose. On that day, by indenture of release reciting that the releasees were in possession of the premises "by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring uses into possession," and in consideration of £100 paid by the releasees, he released the premises to Robert Alexander and seven other persons named, of whom Joseph C. Yates, the original defendant in this action, was one, "and to their heirs and assigns forever." The deed then declared that the conveyance was "upon trust, nevertheless, to the only proper use, benefit and behoof of Cornelius Van Dyck" and twelve other persons named, "members of St. George's Lodge, in the town of Schenectady, and all others who at present are or hereafter may become members of the same, their survivors and successors forever, and to and for no other use, intent and purpose whatsoever." . . .

In 1797 Nicholas Van der Volgen died, leaving a will in which, not having specifically disposed of the reversion of the premises in question,

he made Lawrence and Petrus Van der Volgen his residuary devisees. In 1819 Petrus died, having devised all his estate by will to Myndert Van der Volgen; Lawrence and Myndert being thus the legal representatives of Nicholas in any devisable estate in the premises which he may have had at the time of his death.

In 1833 the act to incorporate the Utica and Schenectady Railroad Company was passed. Under its authority the company instituted proceedings to appropriate the lot in question to the use of the road. To these proceedings Lawrence and Myndert Van der Volgen, Joseph C. Yates, now the sole survivor of the releasees in the before mentioned conveyance, and certain persons claiming to be members of St. George's Lodge, were made parties, all of the *cestuis que trust* named in that instrument being dead. The commissioners awarded six cents to the two Van der Volgens, and $2755 to Yates "as trustee under the release;" and the two former filed their bill in chancery against the latter to compel the payment of the money to them as the representatives of the releasor, and entitled to the land or its proceeds. The vice-chancellor dismissed the bill, and this decree was affirmed by the chancellor (3 Barb. Ch. R., 242.) The complainants appealed to this court.

All the original parties to the action had died since the commencement of the suit, and their personal representatives were the present parties.

RUGGLES, Ch. J. In determining this case it will be assumed that the deed executed by Nicholas Van der Volgen to Robert Alexander and seven others, for the use of Cornelius Van Dyck and twelve others, was a valid conveyance by lease and release, operating by force of the statute of uses, to vest in Van Dyck and others who are specially named as *cestuis que use,* an estate for their joint lives and the life of the survivor, but not an estate in fee: and that the limitation of the further use to "all others who were then or thereafter might become members of St. George's Lodge, their survivors and successors forever," was void for uncertainty; and that the use or equitable interest thus attempted to be given to the members of the lodge not specifically named, cannot be sustained either as a legal estate by force of the statute of uses, or as an executory trust, or as a charitable use. Upon these assumptions the only remaining question is whether upon the death of the last surviving *cestui que use* the estate resulted back to the representatives of the grantor, who are the complainants. If it did so, they are entitled to the money in controversy, otherwise not.

Before the statute of uses, and while uses were subject of chancery jurisdiction exclusively, a use could not be raised by deed without a sufficient consideration; a doctrine taken from the maxim of the civil law, *ex nudo pacto non oritur actio.* In consequence of this rule the court of chancery would not compel the execution of a use, unless it had been raised for a good or valuable consideration; for that would be to enforce *donum gratuitum.* 1 Cruise, tit. xi. ch. 2, § 22.) And where a man made a feoffment to another without any consideration, equity presumed that he meant it to the use of himself; unless he expressly declared it to be to the use of another, and then nothing was presumed contrary to his own expressions. (2 B. Com., 330.) If a person had conveyed his lands to another without consideration, or declaration of uses, the grantor became entitled to the use or pernancy of the profits of the lands thus conveyed.

The doctrine was not altered by the statute of uses. Therefore it became an established principle, that where the legal seizin or possession of lands is transferred by any common law conveyance or assurance, and no use is expressly declared, nor any consideration or evidence of intent to direct the use, such use shall result back to the original owner of the estate; for where there is neither consideration nor declaration of uses, nor any circumstance to show the intention of the parties, it cannot be supposed that the estate was intended to be given away. (1 Cruise, tit. ii., ch. 4, § 20.)

But if a valuable consideration appears, equity will immediately raise a use correspondent to such consideration. (2 Bl. Com., 330.) And if in such case no use is expressly declared, the person to whom the legal estate is conveyed, and from whom the consideration moved, will be entitled to the use. The payment of the consideration leads the use, unless it be expressly declared to some other person. The use results to the original owner where no consideration appears, because it cannot be supposed that the estate was intended to be given away; and by the same rule it will not result where a consideration has been paid, because in such case it cannot be supposed that the parties intended the land should go back to him who had been paid for it.

The statute of uses made no change in the equitable principles which previously governed resulting uses. It united the legal and equitable estates so that after the statute a conveyance of the use was a conveyance of the land; and the land will not result or revert to the origi-

nal owner except where the use would have done so before the statute was passed. (Cruise, tit. x, ch. 4, § 20.)

It is still now, as it was before the statute, "the intention of the parties to be collected from the face of the deed that gives effect to resulting uses." (1 Sanders on Uses, 104, ed. of 1830.)

As a general rule it is true that where the owner "for a pecuniary consideration conveys lands to uses, expressly declaring a part of the use, but making no disposition of the residue, so much of the use as the owner does not dispose of remains in him. (Cruise, tit. xi, ch. 4, § 21.) For example, if an estate be conveyed for valuable consideration to feoffees and their heirs to the use of them for their lives, the remainder of the use will result to the grantor. In such case the intent of the grantor to create a life estate only and to withhold the residue of the use is apparent on the face of the deed; the words of inheritance in the conveyance being effectual only for the purpose of serving the declared use. The consideration expressed in the conveyance is therefore deemed an equivalent only for the life estate. The residue of the use remains in or results to the grantor, because there was no grant of it, nor any intention to grant it, and because it has never been paid for.

But the general rule above stated is clearly inapplicable to a case in which the intention of the grantor, apparent on the face of the deed, is to dispose of the entire use, or in other words of his whole estate in the land. Such is the case now before us for determination. The consideration expressed in Van der Volgen's deed was £100; and it is perfectly clear on the face of the conveyance that he intended to part with his whole title and interest in the land. He limited the use by the terms of his deed "to Cornelius Van Dyck and twelve other members of St. George's Lodge in the town of Schenectady, and all others who at present are, or hereafter may become members of the same, their survivors and successors forever." He attempted to convey the use and beneficial interest to the members of that lodge either as a corporate body, capable of taking by succession forever, or to that association for a charitable use or perpetuity. In either case, if the conveyance had taken effect according to the grantor's intention, it would have passed his whole title, and no part of the use could have resulted to him or his representatives. Admitting that the declaration of the uses was void except as to the *cestuis que use* who were specially

named, and good as to them only for life, yet it cannot be doubted that the parties believed when the deed was executed that the grantor conveyed his whole title in fee, and the intention of the parties that the entire use and interest of the grantor should pass, is as clear as if the limitation of the whole use had been valid and effectual. This intent being established it follows, as a necessary consequence, that the sum of £100 consideration was paid and received as an equivalent for what was intended and supposed to have been conveyed, that is to say for an estate in fee. The express declaration of the use in the present case, instead of being presumptive evidence that the grantor did not intend to part with the use in fee, is conclusive evidence that he did so intend; and the extent of the express declaration is as much the measure of the consideration as if the whole of the declared use had been valid. The complainant's claim to the resulting use, or reversion of the land, being founded solely on the assumption that the grantor never was paid for it, must, therefore, fail because the assumption is disproved by the deed itself.

A use never results against the intent of the parties. "Where there is any circumstance to show the intent of the parties to have been that the use should not result, it will remain in the persons to whom the legal estate is limited." (1 Cruise, tit. xi, Use, ch. 4, § 41.) In this case there are at least two such circumstances. They have already been alluded to; first, the intent expressly declared to convey the land in fee or in perpetuity for the benefit of the members of St. George's Lodge. This effectually repels the idea of a resulting use. The two intents are incompatible. Secondly, the payment of the purchase money, of which enough has been already said.

If it be said that the express declaration is a presumptive proof that the grantor did not intend that the grantees of the legal estate should have that part of the use which was effectually declared, the answer is, that the express declaration is proof at least equally strong that he did not mean that the use should result to himself. Conceding then that the intention of the parties in regard to this residue of the use cannot be carried into effect, the equity which governs resulting uses settles the question between them. It gives the residue to the grantees because the grantor has had the money for it, and the language of the conveyance is sufficient to pass it. The grantor cannot have the purchase money and the land also. Payment of the purchase money

for the entire title, vests the entire use in the grantees, excepting only so much of it as may be effectually declared for the benefit of some other person. . . .

It has been assumed that the use expressed in favor of the members of St. George's Lodge, not specially named, was not valid as a charitable use. But it was not necessary to decide that question. The decision of this case must not be understood as settling any question as to the title to the money in controversy, except that no part of it belongs to the complainants.

HAIGH v. KAYE.

(In Chancery, 1872, L. R. 7 Ch. App. 469.)

SIR W. M. JAMES, L. J. . . . The Defendant admits that there was a conveyance given to him purporting to be executed in consideration of £850 paid by him to the original Plaintiff, G. A. Haigh, by which he became, by purchase, owner of the estate. He admits that there was no such transaction in fact as any sale to him, but that the payment of the £850 was a mere form, and that the Plaintiff paid the expenses of the conveyance to him, or gave him the money to pay them. That being so, he goes on to admit that he was to hold the estate upon trust to pay the rents and profits to the Plaintiff, and when the Plaintiff called upon him for a reconveyance he was to reconvey it. The Plaintiff has called upon him to reconvey the estate, and he suggests by way of answer to that, first of all vaguely and faintly, that this transaction was not altogether a straightforward transaction; that this transaction was entered into with a view to defraud somebody else, The Defendant says in effect, "I am to remain in possession of the estate, because we were both of us engaged in a transaction contrary to the law, and you will not take it away from me to give it to a man who was as bad as I was in the matter; in fact it was an illegal and fraudulent transaction against somebody else, and where there is an equal crime the Court ought to hold that *in pari delicto melior est conditio possidentis.*" However the Defendant has not raised that defense in the way in which according to my judgment, such a defense ought to be raised. If a Defendant means to say that he claims to hold prop-

erty given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the Plaintiff, fearing an adverse decision in the suit of Haigh v. Haigh, conveyed the property to him. I think that is not sufficient.

The next objection taken was upon the Statute of Frauds. The Defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the Statute of Frauds, and claims the estate as a right. Now the Statute of Frauds no doubt says, that a person claiming under any declaration of trust or confidence must show that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear and deliberate fraud. The words of Lord Justice Turner, in the case of Lincoln v. Wright, 4 De G. & J. 16, where he said, "The principle of this Court is that the Statute of Frauds was not made to cover frauds," express a principle upon which this Court has acted in numerous instances, where the Court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained through fraud. It is difficult to distinguish this case from that of Childers v. Childers, 1 De G. & J. 482. It is consistent entirely with Davies v. Otty, 35 Beav. 208, which does not seem to me to carry the matter at all further than the decision of Lord Justice Turner in Lincoln v. Wright, where the Statute of Frauds was attempted to be set up in the same way by a man who claimed to take under an absolute conveyance instead of a mortgage.

That being so, the Statute of Frauds and the ground of supposed illegality of the whole transaction being set aside, the Defendant comes into possession of this property as a trustee for the Plaintiff. Then he says that although he was made a trustee there was a talk about his becoming the purchaser. He does not pretend to say that at that time there was any bargain, but he says that it was understood, before he was called upon to reconvey the property, that if he could make an arrangement to purchase it he was to have it. . . .

I am of opinion that the Defendant has failed to prove his case, and therefore that the decree is quite right in declaring that he is to be

treated as a trustee of the property, and must reconvey it to the representative of the original Plaintiff.

MESCALL v. TULLY.

(Supreme Court of Indiana, 1883, 91 Ind. 96.)

ELLIOTT, J. . . . An express trust cannot be created by parol. As the appellant conveyed the land to Julia Tully by a deed absolute on its face, he can not destroy the effect of his conveyance by alleging that there was a verbal agreement that she should hold it in trust for both of them. Our cases are full upon this subject, and they are in line with the doctrine of the text-writers. Dunn v. Dunn, 82 Ind. 42; Owens v. Lewis, 46 Ind. 488 (15 Am. R. 295); Pearson v. East, 36 Ind. 27; Irwin v. Ivers, 7 Ind. 308; 1 Perry, Trusts, section 79; 1 Greenl. Cr. 356, n.; 1 Hilliard, Real Prop. 425.

The case is not one where the doctrine upon which constructive trusts are founded can have force, for here the only trust is the express one alleged to have been created by parol. Where there is an express trust there can be no implied one. There are no facts upon which the law can frame a construction of a resulting trust. It would be a plain violation of the letter and the spirit of the statute to permit a deed absolute in its terms to be turned into the conveyance of a trust by a verbal agreement. The very evil the statute was intended to prevent is the one which would prevail if an express trust could be created against an absolute conveyance by an oral agreement. The whole purpose of the statute would be defeated if a deed absolute in terms were allowed to be transformed into an instrument creating a trust for the benefit of the grantor or any one else.

There was no contract of sale, and the cases of Fisher v. Wilson, 18 Ind. 133; Wiley v. Bradley, 60 Ind. 62; Stephenson v. Arnold, 89 Ind. 426; Jarboe v. Severin, 85 Ind. 496, have not the slightest application. It would be strange indeed if a party could be permitted, in the face of our broad and explicit statute, to use an oral agreement creating an express trust for the purpose of charging the grantee with the value of the property conveyed by the deed. It would endanger all titles to hold such a doctrine. It finds no support in the cases, and has none in principle. . . .

O'NEILL v. CAPELLE.

(Supreme Court of Missouri, 1876, 62 Mo. 202.)

SHERWOOD, J. This is a suit in the nature of a bill in equity brought by the daughter of the former owner of certain lands situate in St. Louis county, one S. H. Robbins. The object of the suit, in which the husband is joined as co-plaintiff, is to have the deed absolute, under which the defendant holds those lands, declared a mortgage and for permission to redeem, etc. . . .

The record in this cause is a voluminous one, but the matters at issue involved therein lie within a very small compass. In all proceedings like the present, the obvious and chief point for inquiry and determination is: Was the conveyance intended as a security for a debt? If this inquiry receives a reply in the affirmative, it will, in the eyes of equity, effectually and indelibly stamp the conveyance, however absolute in form, with the character, attributes and incidents of a mortgage. Ordinarily it is, perhaps necessary in order to meet the requirements of the statute of frauds, that a defeasance in writing should pass between the parties; but this is not absolutely essential in all cases, for if the grantee deny the trust, equity on proof of the trust will treat such a denial as a fraud and will consequently hold the grantee as firmly bound by his verbal agreement as though the parol defeasance were a written one fortified and hedged about with all the formal solemnity known to the law. (Sto. Eq. Jur., 231, § 1.)

Were the rule otherwise, were a deed absolute in face absolute in fact, the statute for the prevention of frauds would become a monstrous misnomer, and instead of preventing, would promote the creation of countless frauds.

And courts of equity, in enunciating the rule above stated, do but pursue the same enlightened policy in this regard as that which they invaribly pursue in respect to parol contracts for the sale and conveyance of land, parol promises by a mortgagor and vendor of land to his vendee to pay off existing incumbrances (Chapman v. Beardsley, 31 Conn, 115). and parol promises by parties exchanging lands to remove incumbrances. (Pratt v. Clark, 57 Mo. 189.)

If, however, any given transaction should turn out, upon investigation, to be a conditional sale, and it should be satisfactorily established to be a real sale and not a thin disguise whereby a loan is concealed, as a matter of course such transaction will be held valid in accordance with the intention of the parties. But courts of equity watch transactions of this sort with such jealous and ever vigilant solicitude, that if the matter be in doubt, they will resolve that doubt in favor of the theory of a mortgage, and compel the transaction to assume and wear that hue and complexion. (Sto. Eq. Jur., §§ 1018b, 1019.)

In the case at bar, not the slightest doubt can exist. The defendant denied and repudiated the trust; this paved the way for the introduction of parol testimony; and it was introduced with cogent and telling effect. The allegations of the petition were established in every essential particular; the decisive test in such cases, the existence of the debt, was proved beyond controversy. The defendant's acts, his admission before the trial, and at the trial when a witness, place the matter in the clearest possible light. In addition to that, the defendant kept an account with the property conveyed, charging M. W. Robbins, "whose name he took the liberty of using to keep a memorandum account," with sums expended in relation thereto—recorded the deed from Ghio to defendant, etc., and besides, wrote numerous letters to S. H. Robbins, admitting in terms not to be misunderstood, the attitude the defendant occupied in relation to the property. But it can serve no useful purpose to cite or quote the evidence in detail; it shall suffice to say that a plainer or stronger case never invoked equitable interposition. . . .

CALDWELL v. CALDWELL.

(Supreme Court of Kentucky, 1870, 70 Ky. (7 Bush) 515.)

ROBERTSON, C. J. . . . In the year 1863, Alexander Caldwell, a citizen of Campbell County, Kentucky, shortly before his death, published his last will, whereby he contemplated a proximate equality in the distribution of his estate among his six children, one of whom, James Caldwell, was then a soldier in the Confederate army. The

testator, sympathizing with that son and the cause he had espoused, indicated a desire to secure to him "the home place" of nearly three hundred acres of land, which would not have exceeded the value of the devises to each of his other five children then near him. But apprehending that James, if he should even survive the war, might by his rebellion against the Government of the United States forfeit his estate, he devised the legal title of the "home place" to his other five children, on a latent trust that if James should ever return, and be capable of holding the title, they should convey it to him. And this, according to satisfactory oral testimony, they understood and tacitly agreed to fulfill.

On his return, about the close of the war, there being no danger of forfeiture, two of those devisees, Daniel and William Caldwell, true to the trust, each conveyed to him one fifth of the land, of the whole of which he thereupon took possession with the apparent acquiescence of the other three devisees of the home tract; and this possession he appears to have retained without disturbance or complaint for more than three years, when the three recusant devisees and the husband of one of them refusing to convey their interests to him, he on the 10th of September, 1869, brought this suit against them for enforcing their obligation under a resulting trust. His petition charging the trust was denied by their answer; and on that issue the circuit court decreed a release to James of their title, and by this appeal they seek to reverse that decree.

Implied trusts being excepted from the statute of frauds and perjuries, if the facts established such a trust in this case, no written memorial of it was necessary for enforcing it, nor was the oral testimony incompetent on the alleged ground that it contradicts the will.

Extraneous testimony is incompetent to supply an unintentional omission or to contradict an expressed intention in a will. But the facts established by extrinsic evidence in this case have no such aim or effect. They are consistent with the testator's intention, and with the concession that the will is just what he intended it to be, and they supply nothing which he unintentionally omitted. He intended to pretermit his son James as an express devisee of the land, and to rely for his benefit on the plighted honor of the express devisees. Might he not have done so securely on a promise that the five devisees would pay to James ten thousand dollars? and would proof of such agree-

ment contradict the will, or supply any unintentional omission in it, without which omission his purpose of making James a co-equal beneficiary might have been frustrated by impending forfeiture?

The competency of oral testimony for establishing and enforcing such trusts as that claimed in this case is prescriptively recognized by undeviating authorities, among a great multitude of which we only cite the following: Drakeford v. Weeks, 3 Atkins, 639; Barrow v. Greenhough, 3 Vesey, 152; Strickland v. Aldridge, 9 Vesey, 519; Maislar v. Gillespie, 11 Vesey, 639; 2 Powell on Devises, 415. To these citations we might, if deemed needful, add many others in England and America, and even in this court, illustrative of the same principles.

On the like principles the most familiar case of resulting trusts is upheld. Why else, where an unqualified title to land is conveyed to one, the law has adjudged that he holds it in trust for another on oral proof that the latter paid the consideration, in the absence of any fact authorizing a countervailing presumption? In such a case there is no sale of land by the one to the other requiring writing, and the extraneous fact is admitted not to contradict the deed, but to prevent a fraud.

So here, had not the actual devisees been understood by the testator as accepting the devise in trust for James, an essentially different will would have been made, excluding their power over the land as devised; and consequently their refusal to execute the trust is a constructive fraud on the testator as well as on their brother James.

The proof of the trust is corroborated by the conduct of Daniel and William, by the testator's purpose of equality, and by the apparent recognition of it by the acquiescence in the claim and possession by James for years since his return.

We are satisfied that the will was made as it is, with the mutual understanding of the trust as claimed.

Wherefore, we conclude that the judgment of the circuit court is right, and therefore affirm it.

PHILLIPS v. PHILLIPS.

(Supreme Court of Missouri, 1872, 50 Mo. 603.)

BLISS, J. The plaintiff seeks to quiet and have confirmed to him the title to some 9,000 acres of land which he claims were deeded to him by his father, Shapley R. Phillips, while living, but shows that the deeds were lost without being recorded. He makes the heirs of decedent parties, and also the heirs of Mrs. Phillips, now deceased, who was a second wife and not his mother, and who had elected to take a child's interest in the estate of her deceased husband. Mrs. Phillips' heirs alone seem to be defending, but I find a minor grandson of said Shapley R. among the parties, whose interest the court should protect without reference to the character of the defense made by his guardian. The whole claim, then, of the plaintiff must be treated as contested both by Mrs. Phillips' heirs, as inheriting her interest in the estate, and the plaintiff co-heirs.

It is established by the clearest evidence that Shapley R. Phillips, in February, 1861, two years previous to his death, executed to the plaintiff three deeds to the land claimed in this proceeding, and that his said wife joined in the deeds, relinquishing her dower. These conveyances embraced all the land owned by decedent except the home farm of about 1,800 acres, and the consideration expressed was love and affection and $1,000, which sum the plaintiff does not claim to have paid. . . .

The decree of the court below vests in the plaintiff the whole property contained in the three deeds to hold for his own use. The circumstances attending their execution, and the declarations of the grantor, indicate that he intended the property conveyed to be held for the use of his three children. No other reason can be given for his desire that it should be embraced in three deeds instead of one. Though that fact of itself may prove nothing, yet in connection with the circumstances surrounding their execution, it is not without significance. There is nothing whatever that indicates any design to disinherit the other children. That was not the motive that induced the conveyance, but the grantor seemed for some reason to have

a strong desire that the ownership of his lands should be settled, or that they should be disposed of before he died, reserving only the home farm. When asked why he conveyed them all to Amos, he replied that Amos would not wrong his brother and sister; or, as the magistrate testified at the trial, "When I asked him, why write these deeds, why not make one to each of his children?" he said, "Make the deeds to Amos; he will never defraud his brother and sister." Amos had just come of age, one of his other children was a daughter; her age was not given, and the other one an infant son. It is evident that, instead of dividing up his land himself, he trusted the division to his eldest son, and for reasons which, perhaps, do not appear. But enough appears to show a trust and confidence reposed in him, and that to ignore it would defraud his brother and sister."

In this proceeding we are not called upon to say whether or not this trust would be enforced at the suit of his brother and the heir of the sister. But the court will not put him who manifests a disposition to ignore his obligation in a position to be able to profit by such disposition; and even if we conceded that no obligation was shown, still a preference of one child over another is of itself so contrary to natural justice and the policy of our laws that we should not be inclined to aid such preference. The decree below gives the plaintiff an absolute title. The other heirs are made parties and are bound by it, and are so far disinherited entirely. It is true they make no defense, and the brother being now of age may trust the plaintiff if he chooses, and consent to this judgment; but the infant heir of his sister can consent to nothing, and it is the duty of the court to protect his rights. The judgment of the court should therefore be reversed and the cause remanded. If the plaintiff shall be willing to protect the rights and interest of his sister's child, we think he is entitled to relief, and the court below should give him judgment upon his making a satisfactory provision for such minor, either by an independent instrument or in the judgment; and if he declines to make such provision he should not be aided in perfecting his title. The other judges concur.

PERRY v. STRAWBRIDGE.

(Supreme Court of Missouri, 1907, 209 Mo. 621, 108 S. W. 641.)

GRAVES, J. . . . This is an exceedingly interesting case. The question for determination, bluntly stated, is, Can a husband who murders his wife inherit the one-half part of her estate under section 2938, Revised Statutes, 1899? To this State it is a new question, and, with few exceptions, a new one in all the States. But few courts of last resort have been called upon to pass upon the question as to what effect the criminal act of a prospective legal heir will have upon his or her rights, under positive statutes governing descents and distributions. Of those which have passed upon it we frankly confess that the holdings of a majority thereof are against the views which we entertain and will hereafter express. We are not satisfied with the reasoning of those cases and have been unable to reach the conclusion that a mere prospective legal heir, or devisee in a will, can make certain that which was uncertain, by his own felonious act, in the cold-blooded murder of the party from whom he or she expects to inherit. We do not believe that these courts have fully applied and used the canons of statutory construction which we have the right to use and ought to use to avoid a result so repugnant to common right and common decency. The construction as has been given such statutes bruises and wounds the finer sensibilities of every man. In the case at bar, the murdered woman, younger in years, might have outlived the prospective heir. The property involved in this very suit might have been used by her for her own comforts even though she had died first. Being hers it might have been sold and the proceeds disposed of by gift or otherwise. Can it be said that one, by high-handed murder, can not only make himself an heir in fact, when he had but a mere expectancy before, but further shall enjoy the fruits of his own crime? To us this seems abhorrent to all reason, and reason is the better element of the law. . . .

In fact, the pathway of judicial literature from the earliest period down to the present is literally strewn with cases, which like beacon lights have guided the hand of justice in preventing unjust, un-

righteous, absurd, unreasonable and abhorrent results from the use of general words and expressions in statutes. To cite and quote more would be but to become tedious. We have gone thus far on account of the newness of the particular question of this case. Under these authorities we should not and will not hold, that "widower" as used in section 2938, supra, means one who has created a condition by murderous hands and heart. This case is without the statute. "Widower" as there used means one who has been reduced to that condition by the ordinary and usual vissitudes of life, and not one who, by felonious act, has himself created that condition. . . .

ELLERSON v. WESTCOTT.

(New York Court of Appeals, 1896, 148 N. Y. 149, 42 N. E. 540.)

The plaintiff, claiming as one of the heirs of her brother, Munroe Westcott, who died May 9, 1891, seised of several parcels of real estate, in November, 1893, commenced this action for partition. . . . After issue had been joined, the plaintiff made a motion at special term to amend her complaint, which motion has given rise to this appeal. The amendment sought was to permit her to allege, in substance, that the defendant Elizabeth P. Wescott, for the purpose of realizing the benefits given her by the will, caused the death of the testator by the administration of poison or by other means. The special term denied the motion, but its order was reversed by the general term, and from the order of reversal this appeal is taken.

Isaac H. Maynard, for appellants. A. P. Wales, for respondent.

ANDREWS, C. J. (after stating the facts). The plaintiff and the defendants Elizabeth P. Westcott and Cora P. Ganung were never tenants in common or joint tenants of the real property sought to be partitioned. The plaintiff claims title as one of the heirs at law of the testator, Munroe Westcott. The record title is by the will in the defendants named and others. If the will is given full effect, the plaintiff has no title to or interest in the land. . . . If the fact stated in the proposed amendment, to the effect that the defendant Elizabeth P. Westcott caused the death of the testator by poisoning or other felonious means to enable her to come into possession of the

estate devised to her, would, if proved, make the devise to her void, the court had power to permit the amendment to be made, and the denial of the motion at special term, which was put on the want of power was erroneous. If, on the other hand, conceding that the fact sought to be introduced by amendment was true, nevertheless the devise to the testator's wife was not thereby rendered void, the issue tendered could not be tried in a partition action. The plaintiff relies upon the case of Riggs v. Palmer, 115 N. Y. 514, 22 N. E. 188, as establishing that where a legatee or devisee under a will, to prevent a revocation or to anticipate the enjoyment of the benefit conferred, puts the testator to death, the felonious act makes the legacy or devise void. We think this contention is not justified by that case. That was an action by an heir at law of a testator against a devisee and legatee who had murdered the testator to obtain the possession of the property given him by the will, to cancel the provisions for his benefit, and to have it adjudged that he was not entitled to take under the will, or to share, as distributee or otherwise, in the estate of the testator; and the relief was granted. But the court did not decide that the will was void. A will may be void for many reasons. It may not have been executed with the forms required by law. It may dispose of the property upon limitations in contravention of law. The testator may, by reason of alienage or other incapacity, be incapable of making a will. The statute may interpose a prohibition against devises or bequests to certain persons or corporations, or affix limitations; and wills made in violation of the statute will be void, either in whole or partially. Hall v. Hall, 81 N. Y. 130. A will may be procured by fraud or undue influence, and, if this is established, the will is void, because it is not in law the act of the testator.

But the case presented by the fact sought to be introduced by the amendment to the complaint in this action does not show, or tend to show, that the will was void. It alleges neither incompetency on the part of the testator, nor any defect in the execution of the will, nor that the devise to the testator's wife was in contravention of any statute, nor that it was procured by fraud or undue influence, nor that the wife was under any incapacity to take and hold property by will. If the fact sought to be incorporated in the complaint can be established, Riggs v. Palmer is an authority that a court of equity will intervene, and deprive her of the benefit of the devise. It will defeat the fraud

by staying her hand and enjoining her from claiming under the will. But the devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court, in a proper action, will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution, and deprive her of the use of the property. The civil law debarred one who procured the death of another from succeeding to his estate, either as testamentary heir or by inheritance, on the ground that he was unworthy. Domat says he shall be deprived to the inheritance (part 2, bk. 1, tit. 1, sec. 3), and in the Code Napoleon (section 627) such a person is classed among those "unworthy to succeed, and as such excluded from succession." This was one of the penalties for his misconduct. It operated to exclude him from the benefit of the devise on the principle that by his conduct he had debarred himself from claiming it. . . .

TENNISON v. TENNISON.

(Supreme Court of Missouri, 1870, 46 Mo. 77.)

CURRIER, J. . . . The petition shows in brief that the plaintiff intermarried with the defendant, Archibald Tennison, many years ago, and that they have ever since lived together as husband and wife, and are still so living together in that relation; that the plaintiff, subsequently to such intermarriage, derived from her father and his estate a considerable amount of money and property; that it was mutually arranged and agreed upon between herself and husband that he should take a certain portion of such property as his own absolute estate, the plaintiff waiving her right to a settlement of any portion of it upon herself, and that he did so receive and appropriate to his own use his agreed proportion of said property; that her husband, in consideration thereof, agreed to invest certain other moneys, together with certain land warrants acquired by the plaintiff from her father and his said estate, in lands to the sole and separate use

of the plaintiff and in her name; that her husband, in consideration and in pursuance of the premises, did in fact apply, use, and invest such moneys and land warrants in the purchase and acquisition of the lands described in the petition, taking a deed thereof in his own name; the plaintiff supposing and believing, however, that the lands were conveyed directly to herself for her separate use. The petition further shows that the plaintiff's husband and the other defendants entered into a fraudulent combination and conspiracy to cozen and cheat the plaintiff out of her equitable right, title, and interest in said lands; and that her husband, in pursuance of such fraudulent conspiracy, conveyed said lands to the other defendants voluntarily and without consideration, and with a view fraudulently to cut off and defeat the plaintiff's equitable rights, the grantees therein being parties to the alleged fraud. The petition also shows that two of said grantees have purchased and acquired the interest of one of the other grantees, taking such interest, however, with a full knowledge of the alleged fraud.

Such is the substance of the petition, and the question is raised whether the post-nuptial agreement therein stated, and the other connected facts therein alleged, are of a character to warrant the granting of the relief sought.

The theory of the common law that husband and wife, for legal purposes, constituted but one personality, and that they are consequently incompetent to contract with each other, has but a limited and quite restricted application in equity. For many purposes courts of equity treat them as separate and independent persons, and fully recognize their authority and capacity to make valid and binding contracts between themselves, and to have separate and independent estates, rights, interests and liabilities. A contract between husband and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with the trustees of the wife for her benefit. In equity, the intervention of trustees is not an indispensable prerequisite to the validity of the contract. (Sto. Eq. Jur., §§ 1368, 1372-4; Barron v. Barron, 24 Verm. 375; Wallingsford v. Allen, 10 Pet. 583; Kenny v. Kenny, 5 Johns, Ch. 463; Resor v. Resor, 9 Ind. 347.)

If the contract set out in the petition had been made between Archibald Tennison acting in his own behalf, and trustees appointed

for that purpose acting in behalf of his wife, the validity of the contract would hardly be questioned either in law or equity. . . .

It is objected, however, in the case at bar, that Tennison, the husband, had reduced the money and property which were employed in the acquisition of the disputed premises, to possession; and it is thence argued that such money and property thereby became his, and that he was consequently at liberty to use and dispose of it as he pleased and without accountability to his wife. The conclusion may be a legitimate one at law, but it is not so in equity, as we have already, perhaps, sufficiently seen. In equity, the mere reception of the property by the husband is not such a reducing of it to possession by him as to defeat the equitable rights of the wife, unless the husband received it solely in the exercise of his marital rights and for the purpose of appropriating it to his own use. (See the several authorities already cited).

In the case before us the petition abundantly shows that the husband did not receive the money and warrants for the purpose of appropriating them to his own use, but expressly and by positive agreement for the benefit of his wife, and to be appropriated to her sole and separate use. He made the contemplated purchase in his own name, and equity will treat him as holding the title as trustee for his wife. The other defendants acquiring their interest without consideration, and as the result of a conspiracy to which they were parties to defraud Mrs. Tennison out of her equitable rights, stand in no better position. . . .

NEBRASKA NATIONAL BANK v. JOHNSON.

(Supreme Court of Nekraska, 1897, 51 Neb. 546, 71 N. W. 294.)

POST, C. J. This was an action in the district court for Douglas county, whereby it was sought to impress with a trust in favor of the plaintiff, the Nebraska National Bank, certain property, to wit, lots 3 and 4 of block 3, Willis Park Place Addition to the city of Omaha, the legal title of which was held by the defendant, Brooks R. Johnson. The cause of action alleged is, in substance, that the defendant above named was, during the month of August, 1890, and

for a long time prior thereto, in the employ of the plaintiff bank, his duties being, for a fixed compensation, to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties, to watch over, guard, and preserve, to the extent of his ability, all property of the bank, including moneys, notes, and papers; that the said defendant, on the 13th day of August, 1890, while in the discharge of his said duties, and in violation of the trust imposed in him by the plaintiff, wrongfully took, carried away, and appropriated to his own use the sum of $5,000 in gold coin, the property of the said plaintiff; that the said defendant thereafter purchased and improved the property above described with plaintiff's said money so wrongfully taken and converted by him, and that said property is now and has for a long time been occupied and claimed as a homestead by the said defendant and his wife, Ellen Johnson. It was further charged that the said Brooks R. Johnson is wholly insolvent, having no property whatever aside from the real estate here in controversy. The prayer was that the defendants might be adjudged to hold said property in trust for the plaintiff, for a decree confirming the title of the latter, and for general relief. . . .

The other questions discussed are (1) whether the relation of the parties toward each other was a fiduciary one in the sense in which that term is understood and employed by courts of equity; (2) whether, assuming, as claimed, that the evidence fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring in favor of the injured party a trust with respect to property purchased by a thief with the fruits of his larceny. The propositions implied from the foregoing inquiries, although separately treated by counsel for defendants, are in fact so nearly akin that they may with propriety be discussed together. It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. It is sufficient that the doctrine therein asserted is, in our judgment, indefensible on authority and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts as developed by courts of equity was intended primarily as a remedy for

fraud in cases where the established rules had proved wholly inadequate, and larceny under the circumstances here disclosed is none the less a fraud upon the owner of the property stolen because committed by a servant instead of one who is, in the technical sense of the term, a trustee. Speaking on that subject, it is said in a recent valuable work: "The subject of constructive trusts is intimately connected with that of frauds; indeed, the basis of all such trusts is fraud, either actual or presumed. Rightly understood, a constructive trust is only a mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching." . . .

In Newton v. Porter, 5 Lans. (N. Y.), 416, which was an action in equity to compel the defendants to account for the proceeds of certain stolen bonds acquired by them with notice of the plaintiff's rights, Miller, P. J., said in reversing the decree below dismissing the complaint; "No exception is made in favor of a person who occupies no fiduciary relation to another, and the elementary books generally do not notice any exception from the rule where the money or property has been obtained by means of a felony. It would certainly be an anomaly in the history of legal proceedings, and a grave reflection upon the administration of justice, if a felon could invest the fruits of his crime, or dispose of them in such manner as to place them beyond the reach of the law." In the same case Balcom, J., after a review of the authorities, said: "The court should not refuse to allow a party to recover the avails of property stolen from him on any technical grounds when the merits of the case clearly require that he should recover, and the court should jump all technicalities and be as astute in discovering a remedy for upholding the rights of such a party as the thief is in contriving ways and means to cheat him out of his property, and the avails of it, by changing the same from one kind to another and placing it in the hands of third persons." And the court of appeals, in affirming the judgment of the supreme court, use language equally emphatic as that above quoted. (Newton v. Porter, 69 N. Y., 133.) It will be observed from an examination of the cases cited in support of the opposing view that they depend, with few exceptions, upon Pascoag Bank v. Hunt, 3 Edw. Ch. (N. Y.), 583, but which, as remarked by Irvine, C., in Tecumseh National Bank v. Russell, 50 Neb., 281, "is directly contrary to the ruling of the same vice chancellor in Bank of America v. Pollock, 4 Edw. Ch. (N. Y.), 215,

and . . . opposed to the well settled principles governing similar cases." . . .

WOODHOUSE v. CRANDALL.

(Supreme Court of Illinois, 1902, 197 Ill. 104, 64 N. E. 292.)

CARTWRIGHT, J. . . . The material question in the case therefore, is, whether the trust fund deposited by Furlong can be traced and identified, and upon that question the law is well settled that it is not necessary the money or bank bills should be identified. The suit is not to recover a specific thing, such as particular pieces of money or bills, but a certain sum of money held in trust, and it is the identity of the fund, and not the identity of the money or currency, which is to be established. In the early case of School Trustees v. Kirwin, 25 Ill. 62, the court said (p. 65): "It is not necessary, if the trust be moneys, that the particular coin or kind of money or the individual pieces shall be identified in order to pursue it, but its identity as a fund must be preserved so that it can be distinguished from all other money. So long as it can be followed as a separate and independent fund, distinguishable from any other fund, it can be pursued." The court held that appellants would be entitled to an enlarged decree in their behalf if the facts established the identity of the fund, but they did not. Again, in Kirby v. Wilson, 98 Ill. 240, the court, in passing on instructions, said (p 247): "If these instructions conveyed to the jury the idea that no recovery could be had unless the identical bills received by Alexander for the cattle came into the hands of the executor, then they were erroneous." It makes no difference, then, in tracing this fund, that the original package of bills was not preserved, but the question is whether the trust fund can be followed and found.

Again, it makes no difference on the question of identity that the fund was mingled with other moneys of the bank. That question was also settled in Kirby v. Wilson, *supra* where it was held that the identity of the fund is not destroyed and lost merely by being mingled with other moneys of the trustee. In that case, Alexander sold cattle and received the proceeds in trust to pay the same over to the Wilsons. He died, and had on his person at the time, $20,500, part of which

(something over $10,000) was obtained on the sale of the Wilson cattle and the balance from the sale of other cattle in which the Wilsons were not interested. All this money the widow after his death, deposited in the bank in her name, and after the executor qualified she gave him a check for the whole amount which she so received and placed in the bank. The court stated the claim on behalf of appellants as follows (p. 245): "The argument is, that plaintiffs, to recover in this case, must prove that Alexander sold the Wilson cattle and retained the identical money received from the sale of the cattle, separate and unmixed with other funds, and that such money, unmixed, passed into the hands of the defendant after the death of Alexander, but if the money was mixed with other funds by Alexander before he returned home, or was commingled with other money by his wife after his death, no recovery can be had by the plaintiffs." The court held that the portion of the proceeds received for the cattle of the Wilsons could be traced and identified as their particular property and might be followed into the hands of the executor, and that they had a preferential claim thereto over general creditors. The court said, if Alexander had disposed of the money in his life-time the case would have been different, but as he retained it and his executor took it, the Wilsons were justly and equitably entitled to a perference. It was decided in In re Hallett's Estate, 13 L. R. Ch. D. 696, that money held in a fiduciary capacity by one who places it in a bank can be recovered from the bank, although mixed with the depositor's own money; that the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, notwithstanding the mingling of the funds. The presumption in such a case is, that the money drawn out by the depositor is his own, even if the trust money and his own are in one account, rather than that he had disregarded his trust and violated his duty. . . .

In this case the money was received March 15, 1893, and the failure was in the following June, and the evidence supported by the legal presumption establishes the identity of the fund and shows what became of it. If it had been shown that the trust fund was withdrawn or actually dissipated, so that none of it remained in the bank, the rule would necessarily be different. If the fund has once been disposed of, no charge can be made against the general estate in the hands of the assignee to the exclusion of other creditors, but, as we have seen, the fact that the same bills were not retained or that the fund is traced

into a larger sum of money in the same bank does not destroy its identity. Equity lays a charge, in such a case, on the fund into which the trust money is traced, and not on the general estate of the trustee. The only question here is what is a sufficient identification, and the rule is, that if it can be shown the money is in a specified place, equity will take out of that place enough money to satisfy the trust. In this case, we think that the trust fund was traced and identified by legitimate evidence and rules of law for ascertaining its identity.

The decree of the superior court of Cook county and the judgment of the Appellate Court are reversed, and the cause is remanded to the superior court, with directions to order the payment by the receiver to the petitioners of the amount of $1152.66 cash remaining in the bank and received by him when he took possession.

RICHARDSON v. NEW ORLEANS DEBENTURE REDEMPTION CO.

(United States Circuit Court of Appeals, 1900, 102 Fed. 780.)

SHELBY, C. J. The bill in this case was filed by the New Orleans Debenture Redemption Company, Limited, against F. L. Richardson, as receiver of the American National Bank, to collect $1,658.60 which the company had deposited in the bank. . . . The company bases its right to recover the money on the alleged fact that the bank had received it as a deposit when it was hoplessly insolvent, and under such circumstances as to make the receipt of it a fraud. . . .

Ordinarily, when funds are deposited in a bank, the relation of debtor and creditor immediately arises between the banker and the depositor. The money deposited becomes the property of the banker. He has the right to use it, but must pay the debt to the depositor by cashing his checks. When the banker obtained the deposit by committing a fraud, as by receiving it after hopeless insolvency, the relation between the parties is very different. The fraud avoids the implied contract between the parties that would arise in its absence, and having barred contract, a trust is the equitable result. The fraud itself gives no lien. The fraud prevents the money deposited from becoming the property of the banker, and therefore prevents the relation

of debtor and creditor arising between the parties. As the money does not become the property of the banker it, of course, remains the property of the depositor. In the banker's hands, therefore, it is a trust fund,—as much so as if it had been a special deposit. The money which the banker has received in due course of honorable business before insolvency has become his property, and he the debtor of those who deposited it. Now, if the banker, having money in his hands, fraudulently receives other money, and mingles it with the moneys on hand, can the defrauded depositor reclaim his money? That is the question presented by this case. The bank received $1,658.60 of the appellee's money just before it closed. It was received under circumstances of fraud so that it remained the property of the appellee. It passed with the other funds to the hands of the receiver; or, if the identical money did not pass to the receiver, the sum turned over to the receiver was increased exactly $1,658.60 by the appellee's deposit. This is clear because if, after receiving the appellee's deposit and placing it with the general funds, payments were made out of the mass of money during the business of the day, it is immaterial whether the the identical dollars deposited by the appellee were paid out or not. The amount that went into the hands of the receiver was, by the deposit of the appellee, increased to the amount of the deposit made by it. If we find that the transaction between the appellee and the bank created a trust or lien on the funds of the bank with which the appellee's deposit was mingled, the trust or lien extended to the whole mass of money, and the paying out of part of it would not remove the charge from the remainder. The question, then, is reduced to this. If a banker takes $1,000 not his own, and mixes the sum with $10,000 of his own money, can the owner of the $1,000 reclaim it? Has he, in equity, a charge on the whole to the amount of his money which has gone into it? Formerly, it was held that he had not. The equitable right of following misapplied money, it was said, depended on identifying it, the equity attaching to the very property misapplied. Money, it was said, had no earmarks, and the tracing of the fund would fail. This view was manifestly inequitable and unjust, and so, finally, it was held that confusion by commingling does not destroy the equity, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion of the fund a priority of right over the other creditors of the possessor and wrongdoer. . . .

Sir George Jessel, master of the rolls, in the case of Knatchbull v. Hallett, 13 Ch. Div. 696, 707, reviewed the English cases on this subject. He shows the struggle of the able judges of the law courts over the earmarking of money, and that finally Lord Ellenborough throws over the doctrine as to money not earmarked not being followed. We cannot take space to cite and quote the many case commented on by the master of the rolls. The opinion is marked by a keen sense of equity and strong common sense. On the direct point in question here he says:

"I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee,—using the term again in its full sense, as including every person in a fiduciary relation. Does it make any difference according to the modern doctrine of equity? I say, none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it." . . .

There should be no question about this doctrine on principle. If one's money is invested in land, the title being taken in another's name, equity creates a resulting trust in the land as against the wrongdoer. If an agent, bailee, or trustee invests another's money in personal property, a trust results. If one's money is lent, and a note or bond taken, the owner of the money can have a lien or trust declared on the note or bond to secure his money so used. Numerous cases show that money can be traced into other assets, notes, bonds, and stocks. There is no good reason for not applying the same doctrine to money, the measure and representative of all property. If one's money is used with other money in buying a bond, equity can fasten a lien on the bond, and sell it to reimburse the one whose money has been so used. So, we think, if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution. The decree of the circuit court is affirmed.

BOHLE v. HASSELBROCH.

(New Jersey Court of Chancery, 1901, 64 N. J. Eq. 334, 51 Atl. 508.)

DIXON, J. . . . It is clear that Mrs. Hasselbroch committed a breach of the trust, when she used the trust funds in buying real estate, and took the title to herself without providing any bond and mortgage as a first lien in favor of the trust estate, as directed by the will of her deceased husband, and the question is, what equitable situation was thereby created.

Several settled doctrines of courts of equity are pertinent to this inquiry.

It is a fundamental principle in regard to trust estates that the trustee shall derive to himself no gain, benefit or advantage by the use of the trust funds; whatever of profit may be made shall belong to and become parcel of the trust estate. McKnight's Executor v. Walsh, 9 C. E. Gr. 498. An outgrowth of this principle is that, as between *cestui que trust* and trustee and all persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, continues to be subject to or affected by the trust. Pennell v. Deffell, 4 De. G. M. & G. 372, 388. As a concomitant of the rule just stated, and to effecutate fully the fundamental principle, another rule exists, that, when the trustee has improperly changed the form of the estate, the *cestui que trust* may elect whether they will accept the estate in its new form or will hold the trustee responsible for it in its original condition. Ferris v. Van Vechten, 73 N. Y. 113. If the improper conversion turns out to be advantageous, they may adopt it and take the profit; if it results in loss, they may insist on having an equivalent for the estate as it was before the change; and when the *cestuis que trust* are infants, the court will deal with the matter as it shall consider best for their interest. Holcomb v. Executor of Holcomb, 3 Stock. 281. This right of election by the *cestuis que trust* is upheld by courts of equity in many cases where there has been misconduct on the part of the trustee, as may be seen by reference to Fox v. Mackreth, 1 Lead. Cas. Eq. 115, and has been fully approved by this court. Mulford v. Bowen, 1

Stock, 797; Stewart v. Lehigh Valley Railroad Co., 9 Vr. 505. It is enforced in cases like the present, for if a trustee purchases property with trust funds in his hands, and takes title in his own name and for his own benefit, he will, at the option of the *cestuis que trust,* be declared to hold it in trust for them. Durling v. Hammar, 5 C. E. Gr. 220; Story Eq. Jur. 1260, 1262. And if, in such a purchase, he has mixed up moneys of his own with the trust funds, a trust will still result to the *cestuis que trust* at their option; and the burden will be on the trustee to show the amount of his own funds used in the purchase, and so far as he fails to make that distinction the court holds the property bound by the trust. Russell v. Jackson, 10 Hare 204, 213; In re Pumfrey, L. R. 22 Ch. Div. 255; Perry, Trusts, § 128; 2 Pom. Eq. Jur. § 1076 (2).

In accordance with these doctrines we think that the complainants, when their right to the possession of the trust estate matured by the death of their mother, were entitled, upon showing that the trust funds had formed a considerable part of the purchase-money by which their mother had acquired title to the Hoboken lots, to elect whether they would claim a lien upon the lots for the amount of trust funds used in the purchase, or would claim the lots, subject to be charged, in favor of the personal representatives of their mother, with so much of the purchase-money as consisted of her own funds, and that, in endeavoring to ascertain how much was trust money and how much was the trustee's own, every reasonable intendment should be made against the trustee through whose fault the truth had become obscure.

Since the complainants, being in possession of the lots, have filed their bill in equity, to have it decreed that by their trustee's purchase they became owners of the fee in remainder after their mother's life estate, they have thereby elected to take the real estate in lieu of the trust money invested therein, and to hold it charged only with their mother's own money so invested. . . .

PIKES PEAK CO. v. PFUNTNER.

(Supreme Court of Michigan, 1909, 158 Mich. 412, 123 N. W. 19.)

The defendant Beller on November 1, 1901, leased to one Ingersoll a parcel of land situated near the Belle Isle bridge in the city of De-

triot for 10 years at an annual rental of $1,500. The lease was assigned to the Detroit Amusement Company. That company constructed a roller coaster and other amusement appliances, and operated them until September, 1906, when the roller coaster was destroyed by fire. The sole property of the company were the lease and the amusement appliances on the land. Defendant Pfuntner was a large stockholder, and from 1904 to October 15, 1906, was its general manager, secretary, and treasurer, a member of its board of directors, and a member of the executive committee, which was composed of three of the directors. . . .

On the 8th day of October, 1906, while Pfuntner was an officer and manager of the company, as above stated, he obtained from Mr. Beller a lease of the premises for five years from November 1, 1911; that being the time at which the first lease would expire.. Pfuntner did not state to his employer or any of its officers his intention to lease the property at the expiration of the lease then in existence, and none of them were aware of his purpose. On the contrary, he intentionally concealed it from them. After obtaining this lease, Pfuntner sold out all his stock in the company. Upon learning that Pfuntner had obtained this lease, the directors held a meeting and passed a resolution reciting that Pfuntner had obtained a lease, declaring that he was at the time an agent of the company and acted in it behalf, and—

"Now, therefore, be it resolved that the Detroit Amusement Company declares that the said Charles H. Pfuntner, in the procuring of said lease, was the agent of this company, and acted in behalf of this company; that this company hereby ratifies and confirms the actions of its said agent, Charles H. Pfuntner, in obtaining a lease of said premises, and elects to treat the said lease so obtained as the property of the Detroit Amusement Company, to the same extent as though the name of the Detroit Amusement Company were contained in said lease as lessee.

"And be it further resolved that a copy of this resolution be served upon Jacob Beller and Charles H. Pfuntner."

The complainant then filed this bill, praying that said lease be held to be the property of the complainant, as assignee of the Detriot Amusement Company, to the same extent as though named in the lease as lessee, and that the defendant be decreed to hold his lease as trustee for the company. The case was heard upon pleadings and proofs taken in open court, and decree entered for complainant. The decree also required complainant to give bond in the sum of $10,000 to Pfuntner as a guaranty against liability to Mr. Beller.

GRANT, J. (after stating the facts). The principles of law controlling this case are too well settled, both by authority and reason, to require much discussion. One occupying a confidential and fiduciary relation to another is held to the utmost fairness and honesty in dealing with the party to whom he stands in that relation. Torrey v. Cement Co., *ante,* 348 (122 N. W. 614).

While it is true the tenant, in the absence of express agreement, has no enforceable right to renewal of the lease, yet it is natural that, other things being equal, the landlord would lease to his present tenant, and that the tenant would prefer to renew the lease. The expectancy is recognized by the law as a valuable asset belonging to the tenant. The law does not permit an agent, officer, or trusted employee to take it from the tenant to whom he owes the duty to protect and advance his interest. Robinson v. Jewett, 116 N. Y. 40 (22 N. E. 224), and the many cases cited; Grumley v. Webb, 44 Mo. 444 (100 Am. Dec. 304); Keech v. Sanford, 1 White & T. Lead. Cas. 62 Note; Davis v. Hamlin, 108 Ill. 39 (48 Am. Rep. 541).

This is because of the wholesome rule that—

"Whenever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated. Keech v. Sanford, *supra.* Except with the full knowledge and consent of his principal, an agent authorized to buy for his principal cannot buy of himself. An agent authorized to sell cannot sell to himself. An agent authorized to buy or sell for his principal cannot buy or sell for himself; nor can an agent take advantage of the knowledge acquired of his principal's business to make profit for himself at his principal's expense. The same rule applies to leases and other similar transactions." Mechem's Outlines of Agency, § 148. . . .

It is no defense for defendant Pfuntner that the company for which he was acting was involved in financial difficulties and was adjudicated a bankrupt. This expectancy belonged, not only to the tenant, but to those to whom the lease might be assigned. The original lessee and his assignees have continued to pay the rent, and the complainant, as we infer from the record, has rebuilt the structure at considerable expense. Pfuntner did not obtain this lease with the knowledge or consent of the party for which he was agent, manager, and a director. It follows that he holds the lease in trust for complainant.

The decree is affirmed, with costs.

FRAZIER v. JEAKINS.

(Supreme Court of Kansas, 1902, 64 Kan. 615, 68 Pac. 24.)

DOSTER, C. J. . . . The sole question in the case relates to the validity of the guardian's sale and deed of the land of her ward to her husband, made, as before stated, upon fair consideration, and free from actual fraud. Are they valid? If not, are they of the class denominated "void," and, therefore, subject to collateral attack? Our judgment is that they are void, and their nullity being known to Frazier, the purchaser, no title passed to him, and, therefore, the collateral action will lie.

Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He shall not be allowed to serve himself under the pretense of serving his *cestui que trust*. The most usual way in which evasions of this salutary rule are attempted is in purchases of the trust estate by, or in the interest of, the trustee. That such purchases shall not be allowed the realization of their purpose is the universal holding of the courts, and a citation to the multitudinous decisions would encumber an opinion more than it would elucidate the rule. A large number of the cases are collected in the notes to Tyler v. Herring, 19 Am. St. Rep. 263 (67 Miss. 169, 6 South. 840); Tyler v. Sanborn, 15 Am. St. Rep. 97 (128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218); Wilson v. Brookshire, 9 L. R. A. 792 (126 Ind. 497, 25 N. E. 131); and this court, in Webb v. Branner, 59 Kan. 190, 52 Pac. 429, recently added another to the list. Nor, in such cases, does the fact that the sale and purchase were *bona fide* and upon full consideration avail to constitute an exception to the rule. That was distinctly so declared in Webb v. Branner, supra, in which it was said:

"It was shown that a fair price was obtained for the lot, but there being a manifest conflict between the duties of the trustee and his personal interests, the courts, for the purpose of removing all opportunity for fraud, generally hold such transfers to be void, whether they appear to be fair or not."

The above-quoted remarks imply that there may be, perhaps, exceptions to the rule, but we know of none. In fact, the main rule that

a trustee may not profit himself out of the trust estate is no better settled than the subsidiary one that lack of fraud in the trustee's dealings will not validate the transaction. The fiduciary relation of trustee and *cestui que trust* is one which does not call so much for rules to redress accomplished wrong as for rules to prevent its accomplishment. The one in question, therefore, is not intended to be merely remedial of wrong actually committed, but, rather, to be preventive, or deterrent, in effect. The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting, and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter. Hence, as was tersely and wisely said by Chief Justice Beasley, in Staats v. Bergen, 17 N. J. Eq. 554: "So jealous is the law upon this point, that a trustee may not put himself in a position in which to be honest must be a strain on him."

Do the foregoing considerations apply to a sale by a guardian of the ward's land to the guardian's husband or wife, as the case may be? We have no hesitation in affirming that they do. It is true that the common-law fiction of the legal identity of the husband and wife and the very nearly complete merger of the latter in the former does not now have recognition. In this state, as allowed by statute, the wife may contract with her husband. They may own separate estates free from any present claim of interest by one in the property of the other—that is, as against the other; but it is not true that, as to their respective possessions, they are srangers in such sense as to take a trustee's sale by one to the other from out the operation of the rule in question. Upon the death of either of them, one-half of his or her property descends, under the statute, to the survivor, and under the statute neither one, without the other's consent, can, by will, devise more than one-half of his or her property. It is true the interest of one in the property of the other is contingent and uncertain, and dependent upon survivorship. It is true that the interest of the one in the land of the other is not of the character of any of the estates known to the common law, but it nevertheless possesses the elements of property. This was distinctly so ruled in Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 254; and, on the strength of the quality of property attaching to the inchoate interest of a wife in her husband's land, she

was allowed in that case to maintain an action to prevent its fraudulent alienation.

However, over and beyond that property interest which husband and wife have in each other's estate, and which possesses the element of pecuniary value, there is a larger consideration. It was well expressed by counsel for defendant in error, who said:

"The affection existing between husband and wife, the marital relation which in a sense makes them one, the implicit confidence which each must have in the other, their natural desire for each other's material prosperity, the relation which enables one to derive and enjoy personal comfort and pleasure from the property of the other, independent of the question of direct or indirect ownership in such property, are all so well recognized in law and understood by all civilized people, that it would be arguing against the experience of centuries to contend that one would not be interested in the welfare of the other, and do all that could be done to enhance the pecuniary interests of the other; therefore, by reason of the relation, no guardian could be impartial in the sale to husband or wife of the property of the ward." . . .

SCHOLLE v. SCHOLLE.

(New York Court of Appeals, 1886, 101 N. Y. 167, 4 N. E. 334.)

EARL, J. . . .The general rule is not disputed that the purchase by a trustee directly or indirectly of any part of a trust estate which he is empowered to sell, as trustee, whether at public auction or private sale is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others. (Fulton v. Whitney, 66 N. Y. 548; Torrey v. Bank of Orleans, 9 Paige, 649; Conger v. Ring, 11 Barb. 356.) But where the trustee has an interest to protect by bidding at the sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested,

is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. (De Caters v. Chaumont, 3 Paige, 178.) . . . Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that these appellants would get a good and perfect title to the lands purchased by them, and their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being.

FISCHLI v. DUMARESLY.

(Kentucky Court of Appeals, 1820, 3 A. K. Marsh, 23.)

BOYLE, C. J. This was a bill filed by Dumaresly against Fischli, to obtain a conveyance of a moiety of four lots in the town of Louisville. He alleges that he and Fischli agreed to jointly purchase the lots, and that Fischli was to advance the whole of the purchase money, and to receive from him interest for his half thereof, until it was repaid. That Fischli accordingly made the purchase of the lots; but instead of taking the conveyance to them jointly, took it to himself, only, and refuses to convey to Dumaresly a moiety of the lots, notwithstanding he has offered to repay one half of the purchase money, with interest. He, therefore, prays that Fischli may be decreed to convey, etc.

Fischli, in his answer, denies that he made the purchase for the joint benefit of Dumaresly and himself. He admits that, at the inception of the negotiation, he conceived the idea of making such a purchase, but alleges that for reasons, which he states in his answer, and to which Dumaresly assented, he declined making a joint purchase, and contracted in his own name, and for his own benefit; and he pleads and relies upon the statute against frauds and perjuries.

The court below decreed Fischli to convey a moiety of the lots, and Dumaresly to repay to Fischli one half of the purchase money, with interest; and to that decree, Fischli prosecutes this writ of error.

It is evident that the decree cannot be sustained. The parol testimony in the cause strongly conduces, indeed, to prove the agreement alleged in the bill; but that agreement was never reduced to writing; and a mere verbal or unwritten contract for lands is remediless, according to the express provisions of the statute against frauds and perjuries.

There may, no doubt, be an equity resulting from facts, or the relation of the parties, which, notwithstanding the statute, may be enforced: for it is only to express contracts that the provisions of the statute apply. As, for example, where the conveyance of land is taken in the name of one, and the purchase money appears to have been paid by another, there will a trust result, by implication, to the latter, which is not within the influence of the statute. But in this case, there is no fact from which a trust can result to Dumaresly. The whole purchase money is admitted to have been paid by Fischli; and if Dumaresly has any equity, it must arise exclusively from the express contract of the parties, which not being in writing, cannot be enforced, according to the provisions of the statute.

The idea suggested in the argument, that Fischli acted as the agent of Dumaresly in making the purchase to the extent of a moiety of the lots, and that the statute does not require the authority of an agent to be in writing, cannot take the case out of the influence of the statute. The sufficiency of the authority of Fischli to have made a joint purchase in Dumaresly's name and his own, is not called in question. He has not done so, but has made the purchase in his own name; and whether he had an authority to make a purchase for the joint benefit of both, or not, is immaterial, if the agreement that he would do so cannot be enforced, because it was not reduced to writing. . . .

SECTION V. TRANSFER OF TRUST PROPERTY

SMITH v. ALLEN.

(Supreme Court of Massachusetts, 1862, 87 Mass. (5 Allen) 457.)

MERRICK, J. The plaintiffs are the surviving partners of the late firm of Smith, Lougee & Co., of San Francisco. The estate of which they seek to recover possession by judgment in this suit against the

defendant, was purchased by Paige, the deceased partner, and was paid for by him with money which he secretly and fraudulently abtracted from the funds of the company. The company is now insolvent, and the plaintiffs claim to have a right to recover possession of the demanded premises, that they may apply the avails of the estate towards the payment to their creditors of the several sums due to them. . . .

The estate thus purchased and paid for by Paige with the money of the company was conveyed by him to the defendant. This bill, therefore, can be maintained against her to recover the possession of it, unless she was a purchaser thereof in good faith, without notice of the fraudulent misconduct of Paige, and for a valuable consideration. But if she was such a purchaser, then she acquired a superior title to the estate, which, having become absolutely vested in her by the conveyance, could not afterwards be defeated by the creditors of her grantor, 2 Story on Eq. § 1258, 1 Ib. 108, 381.

It is immaterial at what time the consideration was paid or passed, if it passed before she had any notice of the fraud, and before any claim of title was set up or asserted against her by the surviving partners, or by the creditors of the company. For it is a well settled principle that a deed which is voluntary or fraudulent in its creation, and voidable by creditors or subsequent purchasers, may become good and indefeasible by matter *ex post facto*. 4 Kent Com. (6th ed.) 463. Sterry v. Arden, 1 Johns. Ch. 261.

Upon examination of the uncontroverted evidence produced on behalf of the defendant, it is apparent that Paige conveyed the demanded premises to her to induce her to enter into an engagement to marry him. On the 11th of April 1853, his wife, Sarah Ann Paige, died at San Francisco. And in a letter bearing date the 24th of June then next following, addressed by him from that place to the defendant, then resident in this state, he offered himself to her in marriage. He urged her acceptance of his offer, and among other things said, "The estate"—referring to the demanded premises—"you may regard as your homestead, and I trust it will be a very dear spot to you, the same as it was to your dear Aunt Sarah, and the children of our mutual love." The import and significance of this proposal cannot be mistaken or misunderstood; it was manifestly tendered as an independent provision for her support, which might prevail upon and induce her

to accede to his wishes. On the 15th of the next ensuing month of July he wrote to his agent Goldsbury, enclosed in his letter a power of attorney from himself, and directed him to make, execute and deliver a deed of the demanded premises to her. Accordingly Goldsbury, in pursuance of the power and of the directions given to him, executed the deed, which was delivered to and accepted by her on the 8th of the following month of September. Of course, after the offer which had been made to her, she perfectly understood the object and purpose of the conveyance. And in a letter bearing date the 29th of October—which was a little less than two months after her acceptance of the deed—written and addressed by her to Paige, and which was received by him upon the 6th day of the ensuing month of December, on which day he acknowledged its receipt, she distinctly accepted his offer and made an unqualified promise to marry him. The correspondence between the parties was continued, and their contract to marry and be married to each other remained in full force during his life. Their marriage was prevented by his death, which occurred early in the following year, in Oregon, where he went on a journey of business to which he had alluded in one of his previous letters to her.

It is not alleged or pretended that the defendant had any knowledge or suspicion of the fraudulent acts of Paige. On the contrary, it is manifest from all the facts and circumstances which have been disclosed in the case that she believed and had reasonable cause to believe that he was a man of wealth, engaged in successful and prosperous business, and that throughout the whole transaction, and in contracting her engagement to him, she conducted herself in perfect good faith. The only question therefore is, whether her contract and promise to marry him constituted a good and valuable consideration for the estate which he had conveyed to her.

There is no doubt that marriage is a valuable consideration. It has always been so regarded. Chancellor Kent says it is held to be of high consideration, and of such weight and force that a marriage formally solemnized subsequently to the conveyance will make a mere voluntary deed good and effectual, and will fix the interest in the estate conveyed indefeasibly in the grantee. 4 Kent, Com. (6th ed.) 463. It was so expressly determined in the case of Steery v. Arden, above cited. And it is there stated by the court that, although nothing was said by the parties concerning the consideration for the conveyance,

either at the time of the solemnization of the marriage, or in the negotiation which preceded it, yet the law will presume that the property conveyed for that purpose did constitute some part of the consideration which induced the party who received it and who was to be benefited by it to enter into that relation. Huston v. Cantril, 11 Leigh, (Va.) 176. If, therefore, the defendant had been actually married to Paige on the 29th of October when she promised to marry him, she would be deemed to have been a purchaser for a valuable consideration, and would be held to have taken the estate conveyed to her, free and purged of any fraud against his partners or creditors which he might have committed. Her title in that case would have been clear and indefeasible. And in reference to the question of the sufficiency and value of the consideration, and consequently of the validity of the title acquired by the conveyance, there does not appear to be any real and substantial distinction between a marriage formally solemnized, and a binding and obligatory agreement, which has been fairly and truly and above all suspicion of collusion made, to form such connection and enter into that relation. All the consequences of a legal obligation accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall without legal excuse fail to fulfil it. But a contract of this kind is not to be regarded as a valuable consideration, merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfil it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material legal obligations to which it subjects them, negotiate a contract for such alliance with any other person. A woman who has voluntarily made such an agreement, cannot without indelicacy, and so not without exposing herself to unfavorable observation and to some loss of public favor and respect, seek elsewhere, except for good and substantial reasons for withdrawing from an engagement by which she has bound herself, for preferment in marriage; and thus her promise and agreement to marry a particular person essentially changes her condition in life. They materially affect not only her opportunities but her right to attempt in that way to improve it. A legal contract and promise made in good faith to marry another must, therefore, like an acual marriage, be deemed to be a valuable consideration

for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers, or the creditors of the grantor.

Applying these principles to the facts disclosed in the present case, it follows as a necessary consequence that the bill cannot be maintained. Judgment must therefore be entered for the defendant.

MOSHIER v. KNOX COLLEGE.

(Supreme Court of Illinois, 1863, 32 Ill. 155.)

BREESE, J. . . . But apart from all this, the appellees ought to retain this decree, because it is shown the indebtedness was for the purchase-money of the premises, and appellant has not shown he was a *bona fide* purchaser for a valuable consideration, paying his money at the time on the faith of the title so purchased. It was incumbent on the appellant to show not only that he had a conveyance for this land, legal in form, but that he actually paid for the land. It is not sufficient that he may have secured the payment of the purchase-money. He must have paid it in fact before he had any notice of appellee' prior equitable title. That is an essential element in the equity, which must exist in order to support appellant's claim, which he attempts to uphold. If he has not paid the purchase-money, no wrong is done him by taking from him a legal title, which has cost him nothing. The answer does not aver that any part of the purchase-money has ever been paid, and he has failed to show that any was paid. It cannot, therefore, be said that the appellant had any equity to support his legal title, and, consequently, he ought not to retain it against the equitable title of the complainant. . . .

GOWER v. DOHENY.

(Supreme Court of Iowa, 1871, 33 Iowa 36.)

DAY, CH. J. . . . We are thus brought to consider in what manner the judgment creditor, purchasing at a sheriff's sale, and those holding under him, are affected by equities of third persons or their

claims under unrecorded deeds. It is well settled that a third person, who purchases at a sheriff's sale, without notice of outstanding equities, is entitled to the same protection as any other purchaser without notice and for value. The rule, however, as to the judgment creditor has oscillated somewhat, and can scarcely yet be regarded as settled in this State. . . . In the case of Evans v. McGlasson, 18 Iowa 152, the court united in holding that a judgment creditor, who becomes a purchaser at sheriff's sale, is protected at law against matters of which, at the time of the purchase, he had no notice, and that this rule also obtains in equity, unless there are equities of so strong and persuasive a nature as to prevent its application; and these, if they are relied upon, must be alleged and proved. As no such equities have been established in the present case, the doctrine of Evans v. McGlasson may be regarded as direct authority for sustaining the title of the plaintiff. But the rights of the judgment creditor received more direct recognition, in the case of Halloway v. Platner, 20 Iowa, 121, in which it was held that when a creditor merges his judgment into a title without actual or constructive notice of prior equities he becomes a purchaser, within the meaning of section 2220 of the Revision, and is entitled to equal protection, in the absence of equitable circumstances, with any other subsequent *bona fide* purchaser. . . .

PUGH v. HIGHLEY.

(Supreme Court of Indiana, 1898, 152 Ind. 252, 53 N. E. 171.)

BAKER, J. . . . The question is: Does a judgment creditor, who in good faith buys at a proper execution sale on his own valid judgment, take the land subject to prior secret equities?

The lien of a judgment attaches only to the actual interest of the debtor in the land. While the judgment remains unexecuted, the lien may be subordinated to any prior equity, though secret; for the creditor pays or surrenders nothing to or for the debtor, and continues to hold against the debtor his full claim, which the court has merely changed from a cause of action into a judgment.

A security for an antecedent debt will be upheld between the parties; but the taker will not be protected against prior secret equities, because he parts with nothing.

But a purchaser who pays the owner the value of the land takes the title clear of equities of which he has no notice.

And a creditor who, without notice, cancels a preexisting debt in consideration of his debtor's conveying him land, is a good faith purchaser for value. To hold that the debtor may sell his land to a stranger and turn over the purchase price (money, notes, goods, land) to his creditor in satisfaction of the debt, whereby the creditor is free from claimants of secret equities; and to hold that the creditor, if the debtor conveys the land to him in payment of the debt, is liable to be affected by secret equities,—is to approve the roundabout and involved, and to condemn the straight and simple, method of accomplishing the same result,—using the land to pay the debt. . . .

DUFF v. RANDALL.

(Supreme Court of California, 1897, 116 Cal. 226, 48 Pac. 66.)

HARRISON, J. . . . A purchaser of real property at an execution sale stands in the same position as any other purchaser from the judgment debtor, and the certificate of sale which he receives from the sheriff is a conveyance within the meaning of the recording act, by which he is protected from the unrecorded claim of others, of which he did not have notice. In Foorman v. Wallace, 75 Cal. 552, certain property standing of record in the name of a judgment debtor had been purchased by the defendant at a sale under execution against him, but more than two years prior to the sale the judgment debtor had conveyed the property to the plaintiff. At the time of the purchase by the defendant this conveyance had not been recorded, but was recorded prior to the execution of the sheriff's deed. To the contention of the plaintiff that the sale by the sheriff was inoperative as against his unrecorded deed, the court said: "The transfer is not perfect until the execution and delivery of the sheriff's deed, but by the doctrine of relation the deed when thus executed is to be deemed and taken as though executed at the date when the lien, of which it is the sequence, originated," and held that the defendant's title obtained at the sheriff's sale was superior to that of the plaintiff under his unrecorded deed. (See, also Stewart v. Freeman, 22 Pa. St. 120; Atwood v.

Bearss, 45 Mich. 469; McMurtrie v. Riddell, 9 Colo. 497; Byers v. Engles, 16 Ark. 543.) By virtue of the principles thus declared, the title acquired by Randall under his purchase at the sheriff's sale must prevail over that held by the plaintiffs, of which he had no notice until after he had paid the purchase money, and received the certificate of sale. He is fully protected in this purchase, and his right to this protection is the same whether he received the notice of the plaintiff's claim before or after the execution of the sheriff's deed. He was a *bona fide* purchaser for value before the notice was given, and his rights cannot be affected by any notice given thereafter. . . .

SCHAFER v. REILLY.

(New York Court of Appeals, 1872, 50 N. Y. 61.)

ALLEN, J. . . . One who takes an assignment of a bond and mortgage, as did Mrs. Burchard in this instance, takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons and strangers.

Mrs. Burchard has taken especial care to foreclose all equities of the mortgagor, and should he attempt a defense to the mortgage, he would be precluded under one of the exceptions to the rule restricting the title which an assignee may acquire to the actual title of the assignee, adopted for the prevention of fraud. (McNiel v. Tenth National Bank, 46 N. Y. 325.) Eminent judges have pronounced in favor of a rule which would only subject the purchaser of choses in action to the equities of the debtors, and which would give them rights as they apparently exist against third persons, but these views have not prevailed. Bush v. Lathrop (22 N. Y. 535), may be regarded as putting the question at rest in this State, and the decision well supported by the opinion of Judge Denio, in which he reviews the cases bearing upon the question, and the dicta of the many judges who have alluded to the subject, commends itself as a just exposition of the law, as well upon principle as upon authority. He adopts the rule as expressed by Lord Thurlow, in Davis v. Austin (1 Ves. 247), "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

WILLIAMS v. DONNELLY.

(Supreme Court of Nebraska, 1898, 54 Neb. 193, 74 N. W. 601.)

HARRISON, C. J. . . . Whether such certificates are more than non-negotiable choses in action is not necessary here to consider or determine; for the purposes of the discussion, without deciding it, it may be conceded that they are not. The rule is that the assignee of a non-negotiable chose in action stands in the shoes of his assignor as to all equities existing between the original parties, or, in other words, receives it subject to all equities existing between the original parties at or prior to the assignment (2 Am. & Eng. Ency. Law (2nd ed.) 1080); but this does not apply as to equities between the assignor and a third person of which the assignee had no notice. (2 Am. & Eng. Ency. Law (2nd ed.) 1080, and note.) It was said by Chancellor Kent in Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441: "It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor." There are decisions which support a contrary doctrine, but the weight of authority is favorable to the foregoing rule, and the reasons given for it are satisfactory; hence we will adopt it, and applying it to the existent conditions developed in the case at bar the portion of the decree of the district court by which the lien of the bank was accorded priority was correct and is affirmed.

STURGE v. STARR.

(High Court of Chancery, 1833, 2 M. & K. 195.)

William Starr bequeathed one sixth of the produce of his real estate to trustees, upon trust to invest the same and pay the dividends into the hands of his daughter Georgiana Whatford, or of such person

as she should appoint, to her separate use, and after her decease upon trust for the benefit of her children. The testator died in 1807. The ceremony of marriage was afterwards performed between Georgiana Whatford and a person named Wright, who was in fact married at the time to another woman. Georgiana Whatford lived with Wright in ignorance of the fact of his prior marriage and received the dividends of the trust fund until the year 1816, when she and her supposed husband contracted to sell her interest in the legacy to John Sturge for the sum of £333 14s., which sum was paid to her and Wright, and a deed of assignment to Sturge, dated the 22nd of June 1816, was executed by them jointly. The bill was filed by Sturge against the representative of the surviving trustee of the trust fund, and Georgiana Whatford, for the purpose of obtaining the benefit of the assignment.

On the part of the defendants, it was contended by Mr. Treslove that the transaction was tainted by the fraud of one of the parties to it, assuming a false character, and imposing as well upon Georgiana Whatford as upon the Plaintiff, was not such an instrument as a court of equity would carry into execution. It was like the case of a legacy given to a person in a character which did not belong to him, and which he had fraudulently induced the testator to believe that he sustained. . . . It was also insisted that Wright ought to have been made a party to the suit.

THE MASTER OF THE ROLLS. The false character under which Wright acted cannot affect the validity of this transaction. The property was Georgiana Whatford's; and the instrument by which it was assigned was her instrument, not her supposed husband's. She might not have executed such an instrument had she been aware of the fraud that had been practiced upon her by Wright; but that fraud could not affect the right of a *bona fide* purchaser. Wright's participation in the execution of the instrument must be considered as nugatory. It is not necessary, therefore, that he should be a party to the suit.

HULING v. ABBOTT.

(Supreme Court of California, 1890, 86 Cal. 423, 25 Pac. 4.)

THORNTON, J.—Action to foreclose a mortgage on a parcel of land situate in Humboldt County. Defendant Abbott was the mortgagor.

Abbott made default, judgment of foreclosure was made and entered against defendants, and from this judgment defendant Bull alone prosecutes an appeal. The following facts are found: On July 7, 1885, Abbott was the owner of the tract of land which he, on the 28th of July, 1886, conveyed to plaintiff by mortgage to secure the payment of a debt due by Abbott to the plaintiff. Abbott's title to this land was derived under a certificate of purchase from the state of California bearing date the day first above mentioned. On the 28th of July, 1886, Abbott assigned his certificate of purchase, and all his title in the land mentioned therein, to one M. H. Crissman, who purchased with actual notice of the existence of plaintiff's mortgage. On April 15, 1887, Crissmon assigned the certificate of purchase and all his title in and to said lands to C. C. Fitzgerald. Fitzgerald purchased with actual notice of the existence of plaintiff's mortgage, and agreed, as part consideration for the assignment, to pay at maturity the debt secured by the mortgage, and for this purpose retained in his hands from the purchase price the full amount of the principal and interest due on the debt. On July 1, 1887, Fitzgerald assigned the certificate of purchase, and all his title to said lands, to one R. W. Rideout, who at the time of his purchase had no knowledge of the existence of plaintiff's mortgage. Thereafter, Rideout, while the owner of the land, received from the state of California, as assignee of the certificate of purchase, a patent for said lands. The plaintiff placed the mortgage on record in the proper office in the county of Humboldt on the nineteenth day of September, 1887. On the 20th of October, 1887, and while the mortgage of plaintiff was of record, Rideout conveyed the lands described in the certificate of purchase above mentioned to the above-named C. C. Fitzgerald. On the second day of January, 1888, Fitzgerald conveyed to the defendant Bull (appellant here) the lands above referred to. At the date of the conveyance last named, Bull had full notice of the record of plaintiff's mortgage, and of the execution and existence of such mortgage.

On the facts above stated, the court rendered judgment in favor of plaintiff. We think the judgment should stand. When Fitzgerald, who was the grantor of Rideout, and who had actual notice of plaintiff's mortgage when he purchased and at the time he conveyed to Rideout, received a conveyance from the latter, he occupied the same position he formerly did; viz., that of a purchaser with notice of

plaintiff's rights and equities. He was not protected by the fact that Rideout, his grantor, was an innocent purchaser. (Talbert v. Singleton, 42 Cal. 391; 2 Devlin on Deeds, sec. 748; 2 Pomeroy's Eq. Jur., sec. 754.) When Fitzgerald secured the conveyance from Rideout, he occupied the same position he did when he purchased from Crissmon,—that of a purchaser with notice of and bound by all the equities of Huling. The court finds that Bull took his conveyance from Fitzgerald with full notice of plaintiff's equities. We cannot see in what way the conclusion can be avoided that plaintiff had a right to enforce his rights against Bull. It may be further observed that it does not appear that Bull paid any money on his purchase. He must, then, be held to occupy the same position that Fitzgerald did, and alike subject to the enforcement of plaintiff's rights.

Judgment affirmed.

MURDOCK & DICKSON v. FINNEY.

(Supreme Court of Missouri, 1855, 21 Mo. 138.)

SCOTT, J. 1. This case appears to turn on the law respecting the assignment of choses in action. The law on this subject seems to be well settled. As between the assignor and the assignee, the equitable right will pass without any notice to the debtor; for the assignor is bound from the moment of the contract. But if the assignee means to go further and make his right attach upon the thing assigned, it is necessary to give notice to the debtor or trustee of the assignment. But if, after a chose in action is transferred by its owner, it is assigned a second time, and the last assignee first give notice to the debtor of his right, his equity will be superior to that of the first assignee who has neglected to give notice; for, by such failure, the first assignee has enabled the owner of the chose in action to commit a fraud by making another sale. The second purchaser, by enquiring of the debtor, might have learned whether the debt had been transferred, or if notice of the transfer had been given to the debtor, he, after such notice, would pay the debt to another at his peril. The precaution of making enquiry is always taken by a diligent purchaser, and if it is not taken, there is neglect, and no relief is extended to him who has been guilty

of it. If both assignees give notice at the same time, or if there is no notice by either assignee, then the rule *qui prior est in tempore potior est in jure* prevails, and the first assignment will be sustained. So that it is seen that notice to the debtor or trustee is necessary, in order to make a perfect and indefeasible assignment of a chose in action. (Dearle v. Hall, 3 Eng. Con. Chan. 266; Heath v. Powers, 9 Mo. Rep. 765.) . . .

LEE v. HOWLETT.

(High Court of Chancery, 1856, 2 K. & J. 531.)

Timothy Tripp Lee, by his will, dated the 30th of June, 1840, amongst other devises, gave to his wife Elizabeth (since deceased) certain freehold and leasehold hereditaments, known as Dell's Manor farm, to hold the same for her life; and, after her decease the testator directed that the same should be sold by public auction, and that the money should be equally divided among his surviving children; and the testator devised and bequeathed the residue of his property, as well funded or otherwise, to his wife for her life, and after her death, to be equally divided amongst his surviving children. And he appointed his wife, and his sons, the Plaintiff Timothy Lee and Cornelius Lee (since deceased), executrix and executors of his will.

The testator died on the 29th of December, 1840, leaving his widow and eleven children surviving him.

By a deed of arrangement, dated in 1841, and executed by all the children, (except one who had died), it was mutually agreed that all the property devised by the testator amongst his surviving children, should be divided and disposed of, subject to the life interest therein, in life manner and shares as if the same had been given, subject as aforesaid, amongst all his children who should survive him, equally, as tenants in common, so that one equal eleventh part or share thereof should go and be paid and payable to each and every, or to the executors, administrators, or assigns of each and every, the said &c. (the children), notwithstanding any or either of them the said &c. should die before the property should become divisible or payable, and the executors or administrators of any of them who might so die should

receive his or her eleventh share, and apply the same as his or her personal estate &c.

Charles Lee, one of the children, by indenture, dated the 24th of March, 1842, mortgaged his reversionary share and interest of all the property under the will and deed of arrangement to one Simon Main, to secure £450 and interest, of which indenture the Plaintiff Timothy Lee had not received notice till the year 1848.

By indenture, dated February 14th, 1844, Charles Lee again assigned his share to a Miss Lys to secure £250 and interest; of which indenture Miss Lys gave notice to the Plaintiff in May, 1844.

At the time of the mortgage to her, Miss Lys had no notice of the prior mortgage.

By indenture dated the 1st of October, 1846, Charles Lee again assigned his share to one Gashes to secure a sum of £300 and interest; of which indenture Gashes gave notice to the Plaintiff in the same month of October, 1846.

The testator's widow having died in 1854, this suit was instituted by the Plaintiff for the administration of the real estate; a previous suit of "Lys v. Lee" had been instituted by Miss Lys to realise her security out of the personal estate, which however was wholly exhausted, leaving nothing but the real estate and its produce for the incumbrancers to look to.

A decree for sale had been made in this suit (Lee v. Howlett), and the usual inquiry directed as to incumbrances on the shares of the children.

Pursuant to the decree Dell's Manor farm had been sold for £3400, and the residuary estate for £500. The Chief Clerk certified as to the incumbrances, and, amongst others, to those on Charles Lee's share as above; the result of his finding being, that the several mortgages, Vaughan (in whom Simon Main's mortgage had become vested), Miss Lys, and Gaches, were entitled according to the date of their incumbrances. But it was arranged that the question of priority, with reference to the dates of the several notices given to the plaintiff, should be argued before the Court on the hearing for further consideration. . . .

VICE-CHANCELLOR SIR W. PAGE WOOD. I am of opinion, that as to that portion of the property which was ordered to be sold, I am bound to hold, on the principle of Foster v. Cockerell, 9 Bligh., N. S.

332; 3 Cl. & F. 456; Deale v. Hall, 3 Russ. 1 and that class of cases, that the incumbrancer who first gave notice of his incumbrance must prevail over the others. The principle does not depend simply on a question of mala fides; but the rule is, that the party who first makes himself master of a chose in action, by giving notice, to prevent its being handed over by the person in whose hands it is to any other claimant,—in other words, who first devests the title of the owner by giving notice to the person through whom the owner must derive the fund—arrests that fund, and acquires the property for himself. Whether the fund be a trust fund held by A in trust for B, or a debt payable by A to B, if B assigns, and his assign requires A to pay the money over to him, that gives him priority over a previous assign of B, who has not given such notice.

It is decided, that this doctrine does not apply to real estate; and in Wiltshire v. Rabbits, 14 Sim. 76, the late Vice-Chancellor of England considered that the doctrine was not applicable to an assignment of an equitable interest in a chattel real. In this case, part of the property is directed to be sold, without saying by whom. The sale must be by the heir or executors. Here, the same person fills both those characters, and the property must therefore pass through him. It must be converted into money, and none of the legatees could have reached that money except through him; and they could never have had the property in the shape of land, but only as money. Then, the executor being bound to pay the shares in this manner, the fact, that, at the time when this security was given, the period for the sale had not arrived, is not material. Whenever the property was sold, and the money paid to the executor, he would hold part of it for Charles Lee, or for the person who had obtained an assignment of his share from Charles Lee. Here, Miss Lys first gave to the executor notice of the assignment in her favor, and therefore she has priority over all other assigns of Charles Lee's share as to this part of the mortgaged property.

As regards the residuary real estate, there is no direction in the will to sell that. It was devised to the testator's wife for life, and after her death to her children. That would carry the fee simple, and the children would not be obliged to take their shares from the hands of any third person; and although, by the deed of arrangement, they seem to have treated it as personal estate, it was in their

own hands; and therefore there can be no question of notice as to this property, but it must go to the incumbrancers according to the order in time which they obtained their securities.

SKILES v. SWITZER.

(Supreme Court of Illinois, 1850, 11 Ill. 533.)

This was a bill in chancery, filed by Switzer and others against the appellants, to set aside certain conveyances and mortgages, made as is alleged, in fraud of creditors. . . .

CATON, J. It is a fatal objection to this decree, that the infant heir of Udell was not a party. The legal title to the property in controversy descended to her, and although her father held it in trust, yet no decree, divesting her of that legal title, could be binding upon her, unless she was properly represented by a guardian appointed to protect her interest. The primary object of the decree was to divest her of the legal title, and as that was not legally done, the balance of the decree, which provides for the disposition of the proceeds of the property, must necessarily be reversed also, for there is nothing upon which it can operate. . . .

CORNWELL v. ORTON.

(Supreme Court of Missouri, 1894, 126 Mo. 355, 28, S. W. 893.)

GANTT, P. J. . . . Again, the doctrine of courts of equity is that equitable estates are considered to all intents and purposes as legal estates. In the construction of the limitations of a trust, courts of equity follow the rules of law applicable to legal estates. The *cestui que trust,* or beneficiary, takes the same estate in duration as in a legal estate, and the estate granted is subject to the same incidents, properties and consequences as belong to similar estates at law. They are alienable, devisable and descendible in the same manner. They are alike subject to dower and curtesy. It is true at one time a widow was not dowable of a trust estate but both in England and in this

country a widow is now dowable in an equitable estate. As to curtesy, actual possession of the estate or the receipt of the rents, issues, and profits by the wife or possession by her trustee for her benefit is equivalent to legal seizin. These principles are elementary.

JOHNSTON v. SPICER.

(New York Court of Appeals, 1887, 107 N. Y. 185, 13 N. E. 753.)

RUGER, C. J. . . . The respondents assert that no claim is made that rights of action escheat to the People, and such seems to have been the theory entertained by the General Term. In the strict sense of the term escheat, perhaps, this may be so, but we assume it to be the law in this State that all rights of property, of whatever nature they may be, revert to the People when the owner dies intestate, and there is a failure of heirs or next of kin, to take such property. We believe it to be the established rule in all civilized countries that, in such case, the property of a resident dying intestate without heirs, reverts to the Sovereign or State, to be administered for the general benefit of the community in which he dies. While there is an absence of specific statutory authority declaring the rights of the State in such property, it is believed to be the uniform practice for it to assume by force of natural law, the control of such property, and to administer it for the benefit of those concerned, and, in the absence of any legal heir, to appropriate the proceeds to the uses of the State.

It is said, in 4 Kent's Commentaries, 425, "It is a principle which lies at the foundation of the right of property that, if the ownership becomes vacant, the right must necessarily subside into the whole community in whom it was originally vested when society first assumed the elements of order and subordination." In a note, it is stated, "the escheats spoken of in the text relate exclusively to land, movables never escheated in the technical sense; and if the owner died intestate and left no lawful representatives, the personal estate remained at the disposition of the crown. In this country it must vest in the State, and so the statute law in some of the States has specially provided." In Perry on Trusts (§ 327), it is said that it was held in Burgess v. Wheate (1 Ed. 177), "that if the *cestui que trust* left no heirs, the

trust estate did not escheat, but that the trustee thenceforth held the estate discharged of the trust." "This is upon the principle that there is no want of a tenant to the land, the trustee being clothed with all the rights of ownership, against all the world except the *cestui que trust* and those claiming under him. But this principle does not apply to chattels where there can be no tenant, nor to leaseholds, nor to an equity of redemption. In the United States, trustees would hold personal property subject to the right of the State as *ultima hieres* in case the *cestui que trust* died without heirs or next kin, and it is conceived they would hold real estate under the same rule." Washburn on Real Property (vol. 3, p. 49) says: "While escheat was regarded as an incident of feudal tenure, it did not extend to the equitable estates of *cestui que trust,* and, by analogy, it is generally understood that if a *cestui que trust* dies intestate, without heirs, the trust fails, and the trustee holds an absolute estate in the property free from the claim of any one. But it is settled by the courts of Maryland, and intimated by Judge Kent in respect to New York, that such would not be the case under the statutes and that if a *cestui que trust* should die without heirs, his equitable estate would escheat to the State." . . .

From this review of the law it would seem that there is no substantial difference between real and personal property in respect to the rights acquired by the State, upon the death of its owner, intestate, without heirs or next of kin. A clear deduction from the authorities seems to lead to the conclusion that the doctrine of escheat applies only to legal estates and does not in a strict sense affect either equitable estates or personal property. It seems also to follow from the authorities cited, that upon the death of Ellen Spicer the State took not the land, but succeeded to the equitable right which she had to a conveyance thereof. This right may possibly be subject to the claims of the creditors, or other equities which would have to be adjusted in an action, by the equitable owners to recover the possession of the land.

The omission in the provisions of the Revised Statutes of the words "died seized of" as contained in the Revised Laws of 1813, relating to escheats is not supposed to have effected any change in the law as the revisors say in their note to this section that it is "new in terms but implied in Revised Laws (380, § 2)." A new rule, however, was intended to be introduced by section 2 of the Revised Statutes, which provides that all escheated lands shall be held by the State or its

grantees subject to the same trusts, etc., to which they would have been subject had they descended. This enactment was intended to obviate the severe rule of the common law by which such lands when escheated were held to belong to the king free from the trust. (Revisors' Notes, 5 N. Y., Statutes at Large (Edm. Ed.), 297.)

With reference to the personal estate of persons dying intestate without next of kin, it appears to have been the uniform practice of the State since its organization to take such property, and hold it either for the benefit of the community at large or some division of the State, or to be returned to such persons as may from considerations of natural justice and equity seem to the legislature to be entitled thereto.

We think therefore, that the property left by Mrs. Spicer reverted to the State upon her death, and that it was competent for the legislature to grant the rights thereby acquired, and the right to administer thereon to such person or persons as in their discretion they judged equitably entitld thereto. (Englishbe v. Helmuth, 3 N. Y. 294.) . . .

BARKER v. SMILEY.

(Supreme Court of Illinois, 1905, 218 Ill. 68, 75 N. E. 787.)

On January 25, 1904, Aura W. Barker filed her petition in the circuit court of Cook county against Mitchell J. Smiley praying for an assignment of her dower in certain premises commonly known as No. 2815 Prairie Avenue, in the city of Chicago. The principal facts as alleged in the petition are as follows: On December 26, 1867, the petitioner was married to one Samuel B. Barker, who died on or about December 30, 1903. On April 30, 1886, Samuel B. Barker, for the consideration of $50,000 acquired the fee simple title to the premises in question, and from the date of the purchase until March 21, 1900, he and his wife occupied it as a homestead. Notwithstanding the title was taken in the name of Samuel B. Barker it is claimed that the purchase was for the petitioner, and he held the title in trust for her until February 2, 1891, when, in consideration of love and affection and one dollar, he conveyed the same to her by warranty deed, which deed was delivered to her and afterwards placed in the

hands of her husband to be placed on record, which he failed to do, and the deed was not recorded until in May, 1893. Petitioner does not claim that the creditors of Samuel B. Barker had any knowledge or notice of this conveyance, but that on the date it was made he was solvent. Samuel B. Barker was engaged in the lumber business in the city of Chicago, and on May 29, 1893, was insolvent. On that date he again conveyed the premises in question to the petitioner by a warranty deed, which was duly filed for record. On May 31, 1893, the Union National Bank of Chicago obtained a judgment, by confession, against Samuel B. Barker for $50,732.75, and execution was issued upon the judgment and levied upon the premises in question. On June 28, 1893, P. A. Lane obtained a judgment, by confession, in the superior court of Cook county against Samuel B. Barker for $3,516.50. Execution was issued upon the judgment and returned, no property found. On July 1, 1893, Lane filed a creditor's bill in the superior court of Cook county against Samuel B. Barker, the Union National Bank and the petitioner, in which he sought to set aside the deed of May 29, 1893. On July 6, 1893, P. A. Lane recovered another judgment in the superior court of Cook county against Samuel B. Barker for $2701.19. An execution was issued upon the judgment and returned no property found. On July 11, 1893, Lane filed another creditor's bill against the same parties for the purpose of setting aside the deed, and on October 18, 1893, the two cases were consolidated. On December 13, 1893, the Union National Bank filed a creditor's bill in the superior court of Cook county against Samuel B. Barker, P. A. Lane, the petitioner, and other judgment creditors of Barker, for the purpose of setting aside said deed of conveyance. Upon answers being filed in the various cases a decree was entered, which found that Aura W. Barker, was not, as against the complainants and cross-complainants, the owner of the premises, except that she was entitled to the sum of $1000 out of the proceeds of said property when sold, for her homestead rights. The premises were ordered sold free and clear of any right, claim or interest of Aura W. Barker. On March 21, 1899, the premises were sold by the master of chancery to the Union National Bank for $35,000. The master paid the $1000, as directed in the decree, to Aura W. Barker. On March 21, 1900, the bank conveyed the premises to the appellee, Mitchell J. Smiley, who thereupon entered into possession, and has continued in possession

ever since. The further allegation of the petition is, that the defendant, Mitchell J. Smiley, combined and confederated with other persons for the purpose of injuring and defrauding the petitioner, and he claims that by virtue of the proceedings between the Union National Bank and P. A. Lane, and the decree therein entered, petitioner's inchoate right of dower was directed to be sold, and was sold, and that the purchaser took the premises clear and divested of her dower. The petition alleges that the premises were sold subject to her dower, that she has a right of dower therein, and prays that the same be set off to her. . . .

WILKIN, J. . . . At the time the property was purchased by Samuel B. Barker, it is claimed that the purchase was made for the petitioner but the title was taken in the name of the husband in trust for her. If these facts are true, the wife would certainly have no dower interest in the property. Dower, at common law, was an estate for life, to which the wife was entitled, on the death of the husband, in the third part of the legal estates of inheritance, in lands and tenements of which the husband was seized, in deed, or in law, in fee simple, or in fee tail, at any time during coverture, and to which any issue which the wife might have had might by any possibility have been heir. (Sisk v. Smith, 1 Gilm. 63; 10 Am. & Eng. Ency. of Law, —2nd ed.—125.) While this rule of the common law has to some extent been modified by statute, yet these modifications have not materially varied the above rule as it is applicable in this case. The conveyance to the husband was merely in trust for the wife. She had the equitable title and he held the naked legal title, which she could have compelled him to convey to her. No right of dower attaches to an estate in which the naked legal title is held in trust for a second party. (King v. Bushnell, 121 Ill. 656.) For this reason, if the title was in the husband in trust for the wife she could claim no dower therein.

There is another good reason why the decree dismissing the petition is correct. At the time of the hearing upon the creditors' bills the petioioner filed her answer, in which she set up the fact of the original purchase having been made for her; that the title was held in trust for her by her husband. That he executed the deed of February 2, 1891, and she asked that her rights be adjudicated. At the time of the hearing she was represented by eminent counsel, who forcibly presented her claim to the court, but notwithstanding this the decree,

upon the merits, was against her. It found that the conveyance of May 29, 1893, was in fraud of creditors, that the premises belonged to the husband, ordered a sale, and provided for the payment of $1000 to her for her homestead. In pursuance of that decree the premises were sold and the deed of conveyance made by the purchaser to appellee. The court had jurisdiction of the person of all the parties, including the petitioner, and also had jurisdiction of the subject matter. The decree, as rendered, was never reversed, but is now in full force and effect and fully executed. To now permit appellant to again litigate these questions would be to give no force or effect to a judicial decree to which she was a party and to entirely set aside a judicial sale properly made. The decree as rendered in the former case was *res judicata* of all matters set up in this petition.

Complaint is made that the premises were sold as the property of the husband, and therefore the wife is entitled to dower. We have nothing to do with the justice, reasonableness or correctness of that decree. It cannot be collaterally attacked, and if it was wrong it was the duty of appellant to appeal from it and in this way preserve her rights. If she is injured by the decree and has lost her dower she has no one to blame but herself. If the property was hers originally she should have had the title taken in her name. When the deed was made to her she should have filed it for record. If she had attended to these matters at the proper time and in the proper way she would now be the owner in fee, but as it is she has slept upon her rights, and therefore must bear the burden of her own negligence. She recognized the provisions of the decree by accepting $1000 of the purchase money in lieu of her homestead, and it would certainly be as unjust to permit her to have dower as it would be to again permit her to claim her homestead.

We find no reversible error, and the decree of the circuit court dismissing the petition will be affirmed.

JAMISON v. ZAUSCH.

(Supreme Court of Missouri, 1909, 227 Mo. 406, 126 S. W. 1023.)

BURGESS, J. This is a suit to partition two parcels of ground in the city of St. Louis, at the southwest corner of Prairie and Easton

avenues. Plaintiff is the widower of Mary Jamison, to whom he was married in 1865, and who, at the time of her death, was the owner of the two parcels sought to be partitioned. . . .

The sole material question on this appeal is, whether the deed from Kilpatrick and wife deprived the plaintiff of the interest which he claims under the provision of the Act of 1895 (section 2938, Revised Statutes 1899), which reads: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

In construing the terms of deeds creating separate equitable estates in the wife this court has uniformly based its conclusions upon what is found to be the intention of the parties, as ascertained from the language employed in the instrument. The rule is that if the grant or devise be to the wife for her separate use, and it clearly appears from the conveyance or will that it was the intention of the grantor or devisor that the husband should not be tenant by the curtesy, this intention will govern, and the husband will not be entitled to curtesy. (Tyler on Infancy and Coverture (2 Ed.), p. 431; 1 Washburn on Real Prop. (6 Ed.), sec 321, p. 147; McTigue v. McTigue, 116 Mo. 138; McBreen v. McBreen, 154 Mo. 323; Woodward v. Woodward, 148 Mo. 241.)

We think that the terms of the deed in question make it very plain that it was the intention of the grantors to wholly deprive the plaintiff, husband of Mrs. Jamison, of his right of curtesy in the land conveyed.

In the McTigue case, supra, the deed under which both parties claimed was in its terms very similar to the Kilpatrick deed, except that the trustee named therein was not the husband of the beneficiary as in this case. It was held in that case that by the terms of the deed an equitable estate of inheritance was vested in the wife, which upon her death intestate, descended to her legal heirs, free from the curtesy of her husband.

In the McBreen case, supra, the court said: "Indeed it is the prevailing doctrine in England and the United States that it is not competent at common law, in a grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy; but it is

equally well settled that in equity an estate may be so limited as to give the wife the inheritance, and by words clearly denoting that intention, to exclude and deprive the husband of curtesy;" citing Tiedeman on Real Prop. (2 Ed.), sec. 105; McTigue v. McTigue, 116 Mo. 138; Grimball v. Patton, 70 Ala. 635; Rigler v. Cloud, 14 Pa. St. 361; Pool v. Blakie, 53 Ill. 495; Haight v. Hall, 74 Wis. 152.

The plaintiff rests his case principally upon the authority of O'Brien v. Ash, 169 Mo. 283. But that case is essentially different from the case at bar. The deed construed in that case was also a conveyance to a trustee for the sole and separate use of the wife, free from the husband's curtesy, and it was held that the deed undertook to cut off the marital rights of only her then husband, and not of any future husband she might have. The husband referred to in the deed having died, the court held that the trust thereupon ceased and terminated, and the use became executed in the beneficiary, and did not thereafter, upon the remarriage of the beneficiary, revive and revest in the trustee. After so construing the deed, the court adds: "In this view of the case, it is unnecessary to discuss whether the Act of 1895 could affect property held by a woman, married or unmarried, under a deed of settlement so formulated as to create a separate equitable estate to the exclusion of all marital rights of any future husband." In that case the court also said: "So long as plaintiff's wife was alive to enjoy the use of her property it belonged to her free from legislative interference, and the Act of 1895 could have no effect or influence upon it, or of her use or disposition of it whatever; but when death came, and she could no longer enjoy it, her acquisition ceased, and with it the right to direct its future use and ownership only as the legislative will was indicated by the statute then in force upon that subject." . . .

IN RE BELLAMY. ELDER v. PEARSON.

(Supreme Court of Judicature, 1883, 25 Ch. D. 620.)

By a deed of settlement, dated the 3rd of May, 1865, hereditaments held for long terms of years were assigned to trustees upon trust for Ann Bellamy for life, and after her death upon trust for Charles Gamble for life, and after his death upon trust for Susan Patten, for life, and "from and after the death of the said Susan Patten, then

upon trust to assign and assure the said leasehold premises unto Miriam Patten for her own use and benefit absolutely."

Miriam Patten married John Culmer in September, 1870, and died on the 21st of December, 1882, leaving him surviving. . . .

KAY, J. The question is whether it is necessary for Mr. Culmer to take out administration to his wife in order to complete his title to these leaseholds.

There is no doubt that as to all chattels real of the wife vested in possession during the coverture the husband surviving need not take out administration to the wife. And the rule is the same as to an equitable term.

The cases, which I have examined in the original reports, are collected in Williams on Executors, 8th Ed. vol. i, p. 701. In the same place it is stated, "But to entitle the husband to the chattels real of the wife, which were not vested in his possession in her right in her lifetime, he must make himself her representative by becoming her administrator. As if a *feme sole* be possessed of a chattel real and be thereof dispossessed, and then take husband and die before recovery of possession, this right will not survive to the husband, but go to the personal representative of the wife."

The illustration there given seems to shew that the writer was referring to a mere right of action, and this is confirmed by the reference to Co. Litt. Page 351, a., where the words are, "Chattels real consisting merely in action, the husband shall not have by the intermarriage, unless he recovereth them in the life of the wife, albeit he survive the wife, as a writ of right of ward," &c., "whereunto the wife was entitled before marriage."

But then it is argued that if this be not a mere right of action, being an interest in remainder in leaseholds for years after a life estate it is only a possibility, and so could not vest in the husband. Lampet's Case, 10 Rep. 46, b., is an authority for the proposition that such an interest was considered a possibility, which at that time could not be granted or assigned to a stranger during the life of the tenant for life, though it might be released to the person in possession. This, however, has long been overruled.

In Donne v. Hart, 2 Russ. & My. 360, a reversionary interest after a life estate in leaseholds for years was held to be assignable by the husband of the reversioner during the existence of the life estate,

and this although the reversionary interest was contingent. It is there stated that it is clear that the wife's contingent legal interest in a term may be sold by the husband, and there is no difference in equity between the legal interest in and the trust of a term.

In Duberley v. Day, 16 Beav. 33, a reversionary interest in leaseholds belonging to a wife was held to be assignable by the husband, if it were of such a nature that it might by possibility vest in the wife in possession during the converture, and the doctrine that such a reversion was a mere possibility of the wife, and as such could not be assigned, it was said is "undoubtedly exploded by the later decisions."

Accordingly I must take it to be settled that a vested reversionary interest, subject to a life estate in leasehold property, which might by possibility come into possession during the coverture is no longer treated as a mere possibility which is unassignable, but it is like any other chattel real of the wife in this respect at least, namely, that the husband can assign it during the coverture, and while it is still reversionary.

I am, therefore, unable to consider such an interest as a mere right in action, or indeed as a right in action in any true sense of those words, and consequently it does not seem to me necessary on principle or authority that the husband surviving (although the wife died before the interest vested in possession), should take out administration to the wife in order to complete his title. . . .

RHOADES v. BLACKISTON.

(Supreme Court of Massachusetts, 1871, 106 Mass. 334.)

Contract for breach of an agreement to sell and deliver coal. At the trial in this court, before Colt, J., the plaintiff testified that after the making of the alleged agreement, and its breach by the defendants, he was adjudged a bankrupt; "that he made the agreement while acting as agent of Alonzo V. Lynde, under authority from him and made it as agent; and he owed Lynde a large sum of money, and had transferred his coal business to him as security for the debt; that it was agreed between them, that Lynde was to furnish the capital, and was to receive all the profits of the business, except enough to support the plaintiff and his family, until the debt should be paid; that after the

debt was paid the property was to be his, and the profits of the business; and that he had no property in the coal, or interest other than as stated, and his own money was not invested in the business; but that he was to have his living out of the business until the debt was paid."

The defendants objected that the plaintiff could not maintain the action, and the judge reported the case for the determination of the full court, if the court should be of opinion that the plaintiff could not maintain the action, judgment to be for the defendants, otherwise the case to stand for trial. . . .

COLT, J. . . . The defendants further contend that the plaintiff's right of action passed to his assignees in bankruptcy, who were appointed in procedings commenced after the alleged breach. It appears that the plaintiff made the contract in the course of a business which he was carrying on for Alonzo V. Lynde, and which he had previously transferred to Lynde as security for a debt, with the agreement that after the debt was paid the property was to be his with the profits of the business, Lynde furnishing all the capital and receiving all the profits, except enough for the support of the plaintiff and his family, until his debts should be paid. And it is claimed that upon these facts the plaintiff had such a legal and equitable interest in the contract that it must pass by the bankruptcy proceedings to the assignees.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied for the payment of his debts. To a plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted. If however the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title vests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time. Webster v. Scales, 4 Dougl. 7; Winch v. Keeley, 1 T. R. 619; Carpenter v. Marnell, 3 B. & P. 40. . . .

The court are of opinion that the rule in these cases. . . . cannot be applied to defeat the plaintiff's action here. The pledged prop-

erty consisted of a business to be carried on with the capital of the party to whom it was transferred. The contracts made in the course of it were the contracts of the principal. The agent had no immediate beneficial interest in them. His interest was only in the future profits, and that contingent on their being sufficient to pay the debt he owed. The contract of Lynde to restore the property to the plaintiff was executory, and there was no claim that the contingency had happened upon which the business and property were to become the plaintiff's. The inference from the facts reported is, that it did not. The support which he was to have for himself and his family was plainly in compensation for his agency in the business. And there is nothing to show that the creditors in bankruptcy have any valuable interest in the contract declared on. . . .

TILLINGHAST v. BRADFORD.

(Supreme Court of Rhode Island, 1858, 5 R. I. 205.)

Demurrer to a bill in equity, filed by the plaintiff as assignee, under the "poor debtor's act," of Hezekiah Sabin the younger, against him, and against Nicholas H. Bradford, trustee under the will of Hezekiah Sabin, Sen., of certain real estate situated in Westminster Street in Providence, held by said Bradford in trust for the benefit of said Hezekiah the younger. . . .

AMES, C. J. The demurrer to this bill is attempted to be supported, substantially, upon two grounds: First, that Hezekiah Sabin, Jr., had not such an equitable interest, under his father's will, in the trust property in question, that he could aliene the same to the plaintiff in trust for his creditors. . . .

The nature of the debtor's interest in the trust property, under his father's will, was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition such remainder to be conveyed to his heirs at law; there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor's life. It is quite clear, that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in

fee, without the legal incidents of such an estate,—inalienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property,—and, so far as subjectiveness to debts in concerned, to the honest policy of the law,—as to be totally void, unless indeed, which is not the case here in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since Brandon v. Robinson, 18 Ves. 429; and in application to such a case as this, is so honest and just, that we would not change it if we could. Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice. . . .

STEIB v. WHITEHEAD.

(Supreme Court of Illinois, 1884, 111 Ill. 247.)

MULKEY, J. Asahel Gridley, by his last will and testament, devised to trustees certain valuable real estate, upon the following trusts, namely: "To keep said lands and tenements well rented; to make reasonable repairs upon the same; to pay promptly all taxes and assessments thereon; to keep the buildings thereon reasonably insured against damages by fire; to pay over all remaining rents and income in cash, into the hands of my said daughter, Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet. . . .

The trustees named in the will having refused to act, by a proper proceeding in chancery William H. Whitehead, the defendant in error, was duly appointed trustee in their stead, and thereupon took possession of the devised premises, and otherwise assumed the duties of the trust. Certain moneys, being a part of the rents and profits of the estate, having come into his hands, as trustee, and which, under the provisions of the will, it was his duty to pay over to Juliet, the daughter, were attached in his hands by one of her creditors. The trustee appeared and filed an answer, as garnishee, setting up the trust and the special provisions of the will above cited, and the question presented

for determination is, whether the money thus held by him was subject to garnishment.

The authorities are not in accord on this subject. Under the rule as laid down by the courts of England, and by the courts of final resort in a number of states of the Union, the fund attached would clearly be subject, in equity, to the payment of the daughter's debts. (Tillinghast v. Bradford, 5 R. I. 205; Smith v. Moore, 37 Ala. 330; Heath v. Bishop, 4 Rich. Eq. 46; McIlvain v. Smith, 42 Mo. 45.) A contrary rule prevails in Pennsylvania, Massachusetts, and perhaps other States, which seems to be supported by the reasoning of the Supreme Court of the United States in Nichols v. Eaton, 91 U. S. 716. The question, so far as we are advised, is a new one in this court, and in view of the respectable authority to be found on either side of it, we feel at liberty to adopt that view which is nearest in accord with our convictions of right and a sound public policy.

That is was the intention of the testator to place the net income of the property beyond the control of his daughter and her creditors while in the hands of the trustee, is manifest, and we perceive no good reason, nor has any been suggested, why this intention should not be given effect. We fully recognize the general proposition that one can not make an absolute gift or other disposition of property, particularly an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment as to defeat the object of the gift itself, for that would be, in effect, to give and not to give in the same breath. Nor do we at all question the general principle that upon the absolute transfer of an estate, the grantor cannot, by any restriction or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or to curtesy, or that it should not descend to the heirs general of the grantee upon his dying intestate, or that the grantee should have no power of disposition over it, the provision, in either or these cases, would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee simple, and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the State by mere private contract.

This can not be done. But while this unquestionably is true, it does not necessarily follow that a father may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life, and the most appropriate, if not the only, way of accomplishing such an object is through the medium of a trust. Yet a trust, however carefully guarded otherwise, would in many cases fall far short of the object of its creation, if the father, in such case, has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the whole object of the settlor is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortune may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers.

The tendency of present legislation is to soften and ameliorate, as far as practicable, the hardships and privations that follow in the wake of poverty and financial disaster. The courts of the country, in the same liberal spirit, have almost uniformly given full effect to such legislation. The practical results of this tendency, we think, upon the whole, have been beneficial, and we are not inclined to render a decision in this case which may be regarded as a retrograde movement. The creditors of the daughter have no ground to complain that they have been misled or wronged in consequence of the provision made for her by her father. It was his own bounty, and so far as they are concerned he had the right to dispose of it as he pleased. The property was not placed in her possession so that she might appear as owner when she was not, and thereby obtain credit. An examination of the public records would have shown that she had no power to sell or assign her equitable interest,—that the extent of her right was to receive the net accumulations of the trust estate from the hands of the trustee, and that these accumulations did not become absolutely hers, so as to render them subject to legal process for her debts, until actually paid to her. . . .

BUSHONG v. TAYLOR.

(Supreme Court of Missouri, 1884, 82 Mo. 660.)

SHERWOOD, J. This was a proceeding in equity and *in rem.* Its object was to subject certain church property of the Methodist Episcopal Church to the payment of a sum of money which became due to the plaintiff, because of a loan made by him to the trustees of that church, for which loan a note was executed by the trustees to plaintiff for $1,250, and a like note to Newkirk, and the board of trustees, also, ordered that a mortgage on the church property be executed for the purpose of securing these notes, but the mortgage was never made. The plaintiff was successful in the trial court in subjecting the church property to the payment of his debt. . . .

Now as to the method of procedure for enforcing the obligation created by the trustees of the church. We are of opinion that the trustees were the only necessary parties defendant. They were selected by the association to hold and manage the property for the sake of convenience, and there is no necessity to look beyond them. . . .

The trustees were empowered by those terms to mortgage or sell church property in discharge of debts for which they had become responsible. They have failed to perform their duty in this regard to the plaintiff, and the arm of the court of equity is not too short to reach them and compel a performance of that duty. Indeed, it may be taken for granted that plaintiffs incurred the debt for the benefit of the society and with their approval relying upon the assurances contained in the book of discipline, and on the promise made by the trustees that a mortgage should be executed to secure the debt. Linn v. Carson, 32 Gratt. 170, sustains this position. And it is immaterial that in that case the plaintiff was one of the trustees of the church; for the plaintiff here was a surety for the trustees, and they being entitled under the terms of the discipline to a mortgage on, or sale of, the property, concerning which the debt was incurred, he will on the plainest and most familiar principles be entitled to be subrogated to all their rights and remedies. 1 Story Eq. Jur., §§ 499, 499e, 502; Furnold v. Bank, 44 Mo. 336. The trustees being entitled to mortgage or to sell the property, and refusing to do their duty, equity will afford

relief by decreeing that to be done which affords the adequate remedy. . . .

CITY OF ST. LOUIS v. KEANE.

(Missouri Court of Appeals, 1887, 27 Mo. App. 642.)

ROMBAUER, J. Under date of April 28, 1884, the city of St. Louis entered into a written contract with John C. Murphy as principal, and the interpleader, William Keane, as one of his sureties, whereby the latter covenanted to construct Gingrass sewer in part, and the city agreed to pay Murphy, for the work and materials, certain specified prices. . . .

The court found that William Keane had a judgment demand against Murphy for $834.00 for money advanced towards the construction of the sewer; that Thaddeus Smith had a demand of $793.71, on open account, for materials furnished to Murphy for the same purpose, and that Thorne & Hunkins had a demand of $117.00 on open account, for materials furnished in like manner. Concerning these facts, there was no controversy.

The court further found, and its finding is well supported by the evidence, that Murphy made an assignment of so much of the fund in the hands of the city as would satisfy the claim of Keane to the latter, to which assignment the city never assented. Whereupon, Keane brought a suit in equity against the city, to subject the funds in its hands to his claim against Murphy; and that a similar action was subsequently brought by Smith.

Upon the facts so found, which are partly conceded, and partly established by evidence, the court decreed that the fund in court be distributed among the three claimants in proportion to the amount of their respective claims, after first deducting the costs of the interpleader proceedings.

From this decree all the interpleaders appeal. Keane claims that, under the evidence, he is entitled to the entire fund, and Smith and Thorne & Hunkins claim that he is entitled to no part thereof, but that the fund should be divided between them in proportion to the amount of their respective claims, and that Keane should be adjudged to pay the costs of the interpleader proceedings.

The court evidently based its decision on the well-settled proposition announced in Heiman v. Fisher (11 Mo. App. 275), that, when assets are brought into a court of equity for distribution, they must be distributed between all the creditors *pari passu,* regardless of the diligence which any of them may have exercised in bringing the fund into court. In this, however, the court ignored a proposition equally well settled, that such disposition is to be made only when neither party has a superior equity or a prior lien on the specific fund. This court, in the case referred to, distinctly announces that, "when a judgment creditor has sued out execution which is returned *nulla bona,* if he file a bill to reach the equitable interest of his debtor, he may have, by his execution and legal diligence, a legal preference to the assistance of the court or a lien on the equitable interest."

In the case at bar, Keane obtained judgment against Murphy. He sued out an execution on such judgment, which was returned *nulla bona.* He thereupon instituted a suit against the city of St. Louis and Murphy to subject Murphy's funds in the city's possession to the lien of such execution by way of equitable garnishment. Such a proceeding was upheld in Pendleton v. Perkins (49 Mo. 569), and, if maintainable, it is not easy to discern how, on any principle applicable to equity proceedings, it would fail to confer on Keane a superior equity, entitling him to be first satisfied out of the fund in court, such fund being admittedly the fund which he had attached, unless the equities of the interpleading materialmen are superior to his.

The fund was charged with this lien before it was brought into court for distribution. In no view of the case, therefore, are the parties before the court entitled to a ratable distribution of the fund. Either the equities of Keane, as a lienor, are superior, as above stated, in which event he is entitled to be first satisfied out of the fund, or the equities of the materialmen are superior, in which event they are entitled to have their claim satisfied in preference to that of Keane; and, as the aggregate of their claims exceeds in amount the entire fund, Keane is entitled to nothing.

On a review of the evidence, we must hold that the last of these propositions is the only correct conclusion which can be reached. We can not see how this case can, on principle, be distinguished from the case of Luthy v. Woods (6 Mo. App. 67, 72), decided by this court, upon full consideration, on a second appeal. There, under a similar

clause in a contract, and under almost identical circumstances, it was held that the equities of the interpleading materialmen arose from the terms of the contract, and the assent to such terms by all the parties, and that such equities were superior to those of a general creditor, who, as in the case at bar, endeavored to secure a priority on the fund by equitable garnishment.

Our opinion as to the correctness of this conclusion is materially aided by the fact that Keane was a party to the contract, that he expressly assented to all its terms, and that he was well aware, when he tried to subject this fund to the payment of his claim, that the city had retained it under the terms of the contract, presumably for the security of the materialmen. . . .

It results from the foregoing that the judgment rendered can not be supported on the evidence. All the judges concurring, it is ordered that the judgment be reversed and the cause be remanded to the trial court, with directions to enter a decree distributing the fund in court ratably between the interpleaders Smith and Thorne & Hunkins, in proportion to their respective claims, after first deducting all costs accrued prior to the filing of any interpleas in the case, and, as to all subsequent costs, to render judgment against the interpleader Keane.

MOORE v. McFALL.

(Appellate Court of Illinois, 1913, 183 Ill. App. 628.)

THOMPSON, J. John J. St. Clair died testate in Benton, Franklin county, Illinois, on December 22, 1880.

This suit arises out of a dispute as to what was the intention and what should be the construction placed on the language used in his will. The controverted part of the will is as follows: "It is my will and desire that my business, hardware, furniture, tin shop and business as transacted by me be continued, and for this purpose and the care and education of my children having confidence in my wife, Rebecca St. Clair, I will and bequeath to said Rebecca St. Clair, my wife all my real and personal property of whatsoever kind, all title and interest therein, and for the purpose of paying my just debts and

education and support of herself and my family, I hereby authorize her, if necessary to sell and dispose of any of said property and real estate without any order or decree of Court, and that she pay all debts that may be just without the intervention of Courts and do and perform all things whatsoever in regard to my property for the purpose of carrying out this will as I might lawfully do. . . .

I desire my business carried on in the name of St. Clair Brothers and authorize and empower my Executrix to execute deeds of conveyance to property she may desire to sell." . . .

It appears that after the death of John J. St. Clair, the widow formed a partnership with her sons, Charles and Guy, and carried on the business in the name of St. Clair Brothers, for the benefit of the family under the supposed authority given her in the will. The business was thus conducted until some time in the year of 1897, when the business having become unprofitable the partnership was dissolved. The testator was in debt about $20,000 when he died.

While the business was being conducted by the said widow and sons, and in order to carry on said business, the widow and her said sons borrowed money from appellees, and when the business was suspended in 1897 there was owing to appellee Cantrell, for money borrowed by the partnership and used in the business, $1,000 and interest. This indebtedness was evidenced by a judgment note, and Cantrell took judgment by confession, on September 27, 1897, for $1,196.50, against all of said partners. Cantrell assigned said judgment to one Ammon, and afterwards repurchased said judgment and by revivor proceedings and issuing execution thereon kept the same alive and seeks in this proceedings to have the same declared a lien on the real estate above described. . . .

The rights of the parties are conceded to rest upon the construction of the will, and such equities as flow from the attempt of the widow to carry out its provision. The testator had a family of nine children and a wife. Only one of his children was of age when he executed his will. Eight minor children and his wife were to be considered. Their support and education was the thing that concerned him, and he sought by his will to make provision to accomplish that purpose. He directed his wife to continue the business he was engaged in as a means to that end. He placed the whole of his estate in the hands of his wife with specific directions to use it in caring for and educating his children. With expressed confidence in his wife, he gave her all he had without

reserve to pay his debts, to carry on the business, and support and educate their children. She accepted the trust and made an honest effort to carry out the expressed wish and will of her deceased husband. She kept the family together and supported and educated the children during their minority. The business was conducted under the name of St. Clair Brothers, as requested by the will. She associated her two eldest sons in the business with her, and while there was no positive requirement of the will so to do, the intimation was strongly that way, when the testator designated "St. Clair Brothers" as the name under which the business was to continue. The business ran along for about seventeen years, but finally became so unprofitable that it had to be suspended altogether, and when closed up the two debts forming the basis of the two judgments of appellees remained unsatisfied.

The main point relied upon by appellants, as error, is the construction given to the will, that the whole of the testator's property was involved in the trust, appellants claiming that only the property embarked in the business at the time of the testator's death was authorized by the will to be used in continuing the business.

A testator may appoint a trustee to continue a business conducted by him at the time of his decease, and may direct what portion of his property is to be used. He may also impress the whole of his estate with the burdens of continuing such business. The intention of the testator as to what part or how much of his estate is to be devoted to such enterprise must be gathered from the language employed in the instrument creating the trust. The intention must be found in the will itself, and when found must, if possible, be given effect. . . .

A careful reading of this will forced the conclusion that the testator intended to place without reserve all of his property in the hands of his wife to be used for the support of herself and for the support and education of his children, coupling therewith a positive direction that she should continue the business. All his assets, special and general, were pledged to the business under the evident hope that the income would meet the requirements of the family and procure the benefits for them according to his expressed wish. The residuary clause strengthens this view. It was all trust property.

A court of equity will lay hold on any property so placed in the hands of a trustee, to satisfy an honest debt created in the execution of an express trust. The evidence shows that both these sums of

money were borrowed to carry on the business, and were used for that purpose. No rule of law has been pointed out which prohibits the application of equitable principles. It would be inequitable to defeat appellees' claims and the decree of the trial court will be affirmed.

Affirmed.

N. J. TITLE GUARANTEE & TRUST CO. v. PARKER.

(New Jersey Court of Chancery, 1915, 84 N. J. Eq. 351, 93 Atl. 196.)

HOWELL, V. C. The essential difference between the two instruments above recited lies in the final destination of the fund of which Mr. and Mrs. Parker were life tenants. The earlier document provides for its distribution in accordance with Mr. Parker's last will and testament, or, if he should die intestate, for its distribution among such persons as would be entitled to receive the same under the intestate laws of New York if he had died intestate and a citizen and resident of that state. It is obvious that in case it should be found that the instrument of 1903 is valid and is subsisting, the whole of the estate in question is disposed of thereby, and that in that case there is nothing left for the second instrument to operate on. It therefore becomes necessary at the outset to determine upon the validity of the earlier instrument. If that is irrevocable, as by its terms it purports to be, and is still in force, then and in such case the distribution of the fund must be in accordance with its provisions.

The general rule is that a completed trust, without reservation of power of revocation, can only be revoked by consent of all the cestuis; and that even a voluntary trust for the benefit wholly or partly of some person or persons other than the grantor if once perfectly created and the relation of trustee and *cestui que trust* is once established, will be enforced, though the settlor has destroyed the deed or has attempted to revoke it by making a second voluntary settlement of the same property, or otherwise, or if the estate by some accident afterwards becomes revested in the settlor. Perry, Trusts, § 104. This is the undoubted rule in New Jersey. Isham v. Delaware, Lackawanna and Western Railroad Co., 11 N. J. Eq. 227. There Thomas G. Trumbull conveyed land to his father, John M. Trumbull, in trust, to be leased

until April 1st, 1840, the rents being payable to Thomas's two sisters, and after that date to be sold for the highest price they would bring, the proceeds to be invested, the interest paid to said sisters during life, and to their children after death, until the youngest child should be twenty-one, and then the principal to be paid to the said children in equal parts *per capita.* In 1836 the two sisters joined with the trustee, their father, in reconveying the lands to the original grantor. It was held that the conveyance did not transfer the legal title to the original grantor. In Gulick v. Gulick, 39 N. J. Eq. 401, the husband conveyed lands to his wife, she to hold the same in trust for his benefit during his lifetime, and at his death to sell the same and divide the proceeds between his widow, if living, and their children or grandchildren. It was held that this was a trust which must be maintained inviolate, and that the husband and wife could not substitute another trust in relation to the same lands in such a manner as to affect the interests of the children and grandchildren. . . .

When, therefore, Mr. Parker executed the original instrument he created a life estate in himself, with remainder to such persons as he should by his last will appoint, and in default of such appointment, to his heirs-at-law and next of kin under the intestate laws of the State of New York, and having executed a last will, in pursuance of the power and reservation contained in the trust deed, by which he gave the residuum of his estate, including the trust fund in question, to the children of his brother, he thereby created remaindermen who, under the provisions of the trust instrument, become entitled, under the rules of law above stated, to the capital of the fund. Having thus irrevocably disposed of the remainder, he could make no further or other disposition of it without the consent of the remaindermen whom he had so created, and, inasmuch as such consent cannot be had, the fund goes irrevocably to them. . . .

KEYES v. CARLETON.

(Supreme Court of Massachusetts, 1886, 141 Mass. 45, 6 N. E. 524.)

Bill in equity, filed April 17, 1884, to have a trust created by the plaintiff, by a certain deed to the defendants William E. Carleton and

Charles E. Abbott, as trustees, declared null and void, and that the trustees be ordered to account for and pay over to the plaintiff the whole of the trust fund.

By the deed, a copy of which was annexed to the bill, the plaintiff, in consideration of five dollars to her paid by Carleton and Abbott, and "the natural love and affection she bears for her children," conveyed to Carleton and Abbott a certain parcel of land in Denver, Colorado, upon the following trusts: "To manage, let, and take care of, to collect and receive the rents, increase, uses, issues, and profits thereof, to pay over and account for the same to the said Mary E. Keyes, or for her use, during her life, and after her decease to pay over and account for the same to her children, or for their use. To sell and convey the same in fee simple at their direction, discharged of all trusts, and at any time after the decease of the said Mary E. Keyes, if they shall see fit and proper, but only in such case, to convey the same to the children or next of kin of the said Mary E. Keyes, and in case it shall not be so conveyed during the lifetime of the said children, then to convey the same to their issue." . . .

The bill alleged that the plaintiff's intention in signing the deed was to place her real estate in such position and condition that her husband could not have any control over it in her lifetime; and that, if she should die before her husband, it should go to her children; that, at the time of signing the deed, she was greatly disturbed in mind, and did not understand the full effect of the deed; that she supposed, in case of her husband's death before hers, the estate would be reconveyed to her discharged of trusts; and that she executed the deed under an entire mistake and misapprehension of its force and effect, as bearing upon her rights in case her husband died before her. . . .

MORTON, C. J. It is settled by the uniform course of the decisions in this Commonwealth that a voluntary settlement, fully executed by a person of sound mind, without any mistake, fraud or undue influence, is binding upon the settler, and cannot be revoked, except so far as a power of revocation has been reserved in the deed. Viney v. Abbott, 109 Mass. 300; Sewall v. Roberts, 115 Mass. 262, and cases cited.

In the case before us, the plaintiff, acting deliberately and under the advice of counsel, executed the deed of settlement, and there is no pretence of any fraud, collusion, or undue influence. The deed con-

tains no power of revocation, and it is clear that the power of revocation was intentionally omitted. As first drafted, the deed created a dry trust in favor of the settler, which probably could have been revoked by her at any time. But if she had retained a power of revocation, it would have defeated one of the principal objects of the settlement, which was to protect her from the threats, or importunities, or influence of her husband, and therefore the deed was altered to its present form. Both parties understood that she was not to have the power to revoke it. It is not, therefore, a case like some of those cited by the plaintiff, where both parties supposed the settlement to be revocable, and the power to revoke was omitted by mistake. See Aylsworth v. Whitcomb, 12 R. I. 298; Garnsey v. Mundy, 9 C. E. Green, 243, and cases cited.

The justice who heard this case has found that no fraud or imposition was practiced on her; that the deed was carefully read over to her; that there was no mistake, in the sense that she thought the deed contained any other or different provision than in fact it contained, and no accident, in the sense that anything was omitted which was intended to be put in; and also that the contingency of her surviving her husband was not in her mind or in that of her advisers, and, if it had been, there was no means of determining what the provision, if any, would have been. From these findings, it is clear that there was no mistake, in the sense that she wrongly apprehended the contents of the deed. The most that can be said is, that she did not, at the time she executed the deed, anticipate or have in her mind what would be the legal effect in the contingency of her husband's dying before her. She did not, at the time, think of this contingency, but this is not a mistake which will justify setting aside a settlement, especially when it is not shown that, if this contingency had been in her mind, she would have made a deed in any respect different. But this was not a purely voluntary settlement. It appears that she was in financial difficulties and in present need of money, and that her brother advanced her, by way of loan, $600, as a part of the transaction, and the condition that she would execute this deed of trust. It seems to have been a family arrangement to save her property for the benefit of her children, and to protect it, not only from the demands of her husband, but possibly from her own improvidence.

It may be that the fact that there was this pecuniary consideration would not prevent a court of equity from setting aside the settlement,

upon proof of fraud or concealment, or upon proof of any material misapprehension on her part of facts which, if known and called to her attention, would have led to a settlement of a different character. But it throws some light upon the transaction, and tends to show that her failure to think of the contingency of her husband's death was immaterial, and that, if she had thought of it, there would have been no change in the provisions of the deed. We are of opinion that the plaintiff does not show sufficient cause for setting aside the settlement, voluntarily and fairly made by her.

Bill dismissed.

EDWARDS v. WELTON.

(Supreme Court of Missouri, (1857) 25 Mo. 378.)

SCOTT, J. This is an attempt, by an action in the nature of trover, to execute a constructive trust. The prayer of the petition is for the possession and delivery of the slave, and in default of delivery, a judgment for his value and his hire. . . .

It is obvious that this action has been misconceived, or at least that the plaintiffs have misconceived their rights, and have instituted their action in such a way as will not secure the adjustment of the trust by one suit. The trust is a joint one. One of its beneficiaries has no sole or exclusive right to any particular part or subject of the trust. Each beneficiary has a right in every part; and this is the first instance which has fallen under our notice in which one of several joint *cestuis que trust* has been permitted to single out one part of the trust fund, assert an exclusive right to it, and enforce that right by an action in the nature of trover. There is nothing whatever in the record which shows that this proceeding has any sanction in the approbation of the other parties who are interested. The instructions, given at the instance of the defendants, other than Solomon Welton, do not help the matter. According to their own showing the plaintiffs were not entitled to more than one-fifth of the value and hire of the slaves in controversy. This fifth would be exclusive of the interest to which they have a right as one of the heirs of the mother and sister. As the plaintiffs have been excluded from all participation in a joint trust in which they have an

interest, it is obvious that their rights can only be enforced in an action in which the whole trust fund is sought to be adjusted. The other *cestuis que trust* being made defendants, the portions they have received on the taking of an account before a commissioner would be taken into consideration, and the entire property divided or sold so as to do full justice between the parties. The parties who are *sui juris* may arrange matters by consent, but that consent, to avoid future litigation should be made apparent by the record. . . .

WAGNER v. WAGNER.

(Supreme Court of Illinois, 1910, 244 Ill. 101, 91 N. E. 55.)

This was a bill filed by appellant for the construction of the will, and first codicil thereto, of his father, George Wagner, deceased. . .

FARMER, C. J. . . . The first codicil, the validity of which is the only question before us for decision, recites that since the making of the original will the testator had converted most of his estate into personal property, and that it was largely represented by shares of stock in the Rock Island Brewing Company, to the building up of which industry he had devoted many years of his life. He expressed the desire and wish that as far as possible his holdings in the brewing company be kept intact by his sons after his death. He then devised and bequeathed to his executors and trustees one-third of his holdings in the Rock Island Brewing Company stock in trust for the benefit of his son Ernst Wagner, appellant, first deducting from the interest held for the benefit of George Wagner such portion of the $5000 bequeathed by the original will to his children as might be necessary to pay the same. The remaining one-third of the testator's Rock Island Brewing Company stock was bequeathed to his son Robert A. Wagner absolutely, to be his forever. The codicil directs the trustees to pay to the testator's sons Ernst and George Wagner the net income derived from the Rock Island Brewing Company stock in such amounts and at such times as in their discretion they shall deem proper, and they are authorized for the support and maintenance of either of said sons, or if for any other purpose they deem it advisable, to pay the said sons any sum greater than the annual net income from said stock, and, if necessary to raise such additional sums, the trustees are given

authority to mortgage, pledge, or sell any portion of the stock. The trustees are requested by the codicil to administer the trusts and deal with the sons Ernst and George as nearly as possibly as the testator would do if living, "keeping in mind, however, my expressed desire to have the Wagner interests remain identified with the Rock Island Brewing Company, as far as practicable. The trusts hereby created shall terminate in the discretion of the trustees or their successors." . . .

We are of opinion, under the authority of the case above cited in this State, and the weight of the current authority in other States, the trust created by the codicil is a valid spendthrift trust. We are also of opinion that, even if the trust created by the codicil should be held invalid as a spendthrift trust, it would be valid as a gift to the sons not to take effect in possession until a future day, namely, the termination of the trust. We are aware that there are respectable authorities holding the contrary and a number of such authorities are cited in appellant's brief, but such trusts are sustained in this State and many others when not in violation of the rule against perpetuities. In Rhoads v. Rhoads, 43 Ill. 239, the testator devised his estate to the executors in trust for his children, with directions and authority to invest the proceeds of the estate in government bonds, and at the expiration of fifteen years after his death to distribute the estate with its accumulations, $10,000 to his wife and the remainder equally among his children. The court, after reviewing the English authorities holding to the contrary held that the postponement of the enjoyment of the gift did not invalidate it and sustained the will.

In Claflin v. Claflin, 149 Mass. 19, (20 N. E. Rep. 454,) the will under consideration gave one-third of the residue of the testator's personal estate to trustees for the benefit of a son and directed its payment to him, $10,000 when he reached the age of twenty-one years, $10,000 when he reached the age of twenty-five years and the balance when he reached the age of thirty years. After he had attained the age of twenty-one years and had been paid $10,000, but before he was twenty-five years of age, he filed a bill to compel the trustees to pay him the remainder of the trust fund. His contention was that the provisions of the will postponing payment beyond the time when he arrived at twenty-one years of age were void. The court said: "There is no doubt that his interest in the trust fund is vested and absolute and

that no other person has any interest in it, and the authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords and but one by a chancellor, but there are several decisions to this effect by masters of the rolls and by vice-chancellors. (Citing numerous authorities.) These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will. This court has ordered trust property conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our Reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are void if the interest of the beneficiary is vested and absolute. . . . It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him and can be taken by his creditors to pay his debts, but it does not follow because the testator has not imposed all possible restrictions that the restrictions which he has imposed should not be carried into effect. . . . The strict execution of the trust has not become impossible. The restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make. Other provisions for the plaintiff are contained in the will apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out." Rhoads v. Rhoads, *supra*, was cited in support of this decision.

Gifts to trustees for the benefit of persons who are objects of the testator's bounty but postponing their enjoyment in possession to a

future day, properly limited as to time, have been sustained in Lunt v. Lunt, 108 Ill. 307, Flanner v. Fellows, 206 id. 136, Howe v. Hodge 152 id. 252, Pearson v. Hanson 230 id. 610, and Armstrong v. Barber, 239 id. 389. The principle of these decisions appears to be that the equitable title vests in the beneficiaries immediately upon the death of the testator, that such trusts are not in restraint of alienation, and that the rule against perpetuities is not violated where the time to which the enjoyment in possession is postponed is properly limited by the will.

Kales on Future Interests, in the chapter on "Restraints on Alienation," discusses Claflin v. Claflin and other cases above cited, and reaches the conclusion that where Steib v. Whitehead, supra, is recognized as law, Claflin v. Claflin and Lunt v. Lunt will be followed, and the postponed enjoyment of an equitable interest, properly limited as to its duration in time, will be held valid. In section 294 the author discusses some of the reasons given by Prof. Gray and Lord Langdale why postponed enjoyment should be held invalid, and says they are chiefly that such provisions are unwise. Discussing this subject the author says: "The worst charge that can be made against holding these postponed enjoyment clauses valid seems to be that they are either harmless, or in an extreme case, viz., where the *cestui* is a spendthrift and insists on selling his equitable interest for cash, unwise. To defeat the testator's intention wholly upon so trivial a ground ought not to be thought of. The attitude of the court in Claflin v. Claflin is in favor of carrying out the settlor's intention, and the result reached is, it is submitted, sound."

We are of opinion the decree of the circuit court was right, and the judgment of the Appellate Court affirming that decree is affirmed.

WYLIE v. BUSHNELL.

(Supreme Court of Illinois, 1917, 277 Ill. 484, 115 N. E. 618.)

CARTER, J. . . . Of course, there can be no question as to the duty of a trustee to keep regular and accurate accounts during the whole course of his trusteeship, from which it can be ascertained what property has come into his hands, what has passed out and what re-

mains therein, including all receipts and disbursements in cash, and the sources from which they came, to whom paid and for what purpose paid. (Warner v. Mettler, supra; Lehman v. Rothbarth, 159 Ill. 270; 3 Pomeroy's Eq. Jur. —3d. ed. sec. 1063; 2 Perry on Trusts, —6th ed. —sec. 821; 2 Beach on Trusts and Trustees, sec. 682.) And these same authorities hold that these accounts should be open at all times to the inspection, on demand, of the beneficiary. No special form, however, of keeping books is required. The question of their competency and sufficiency must be determined by the appearance and character of the accounts, regard being had to the character of the work and the qualifications ordinarily required in keeping books of account as to such business. Separate scraps of paper have been admitted in evidence as books when sworn to as such. A notched stick has been held to be admissible as a book of original entries where the accuracy of the entries was satisfactorily tested by a comparsion with an account made out from notched sticks some time previous. Sheets from a loose-leaf ledger system of account containing the original entries are, when properly identified, admissible in evidence. (10 R. C. L. 1178; Reyburn v. Queen City Saving Bank and Trust Co. 171 Fed. Rep. 609; Bell v. McLeran, 3 Vt. 185; Presley Co. v. Illinois Central Railroad Co. 120 Minn. 295; Packing Co. v. Storage Co. 41 Utah, 92; Ricker v. Davis, 160 Iowa, 37.) The material, form or construction of the book offered in evidence as a book of original entries is unimportant. (9 Am. & Eng. Ency. of Law, —2d ed. — sec. 917; State v. Stephenson, 2 Ann. Cas. (Kan.) 841, and cases cited in note.) The manner of keeping the accounts is the important consideration. If they are in such form and so preserved as to fairly show the true state of the accounts between the parties, and can, under the rules governing the making of such entries, be fairly held to be original entries, that is all that is required. To hold that they must be in bound book form in all cases is giving more importance to form than to substance. The vital question in such cases is whether the entries offered are in the original charges, are true and have been made at or about the time of the transaction. (Graham v. Work, 141 N. W. Rep. (Iowa) 428; United Grocery Co. v. Dannelly, Ann. Cas. 1914d (S. C.) 489, and cases cited in note.) Books consisting of entries for the time or workmen are admissible in evidence though the entries were made from time-slips made out by the workmen and approved by the foreman.

(Chisholm v. Beman Machine Co. 160 Ill. 101.) "Stack sheets" which recorded the number of tons of straw in stacks, made out from scale tickets, are admissible as original entries. Chicago and Alton Railroad Co. v. American Strawboard Co. 190 Ill. 268.

The testimony of plaintiff in error as to his method of keeping accounts was, substantially, that he had a system of keeping folders or large envelopes about twenty-four inches long by eighteen or twenty inches wide, and in them he inserted and kept all the papers as they came into his possession, each year's business separate and kept in a separate folder; that from time to time he made distributions, and in making computations for these distributions he consulted these folders and exhibits and memoranda and papers, in connection with his bank book; that there were no transactions performed by him as trustee or executor for which he did not have vouchers or receipts; that while he had kept a system of accounts in a bound book since the filing of the original bill in this case he had not done so before, as he considered his system of keeping accounts in a separate folder for each year's transactions was fully as accurate, in connection with his pass-book, in which he made all deposits of money, that he received as trustee or as executor; that he considered, before he began the plan of keeping his accounts in a bound book, that he had a system of keeping accounts in these folders in which all the original receipts, vouchers, correspondence and everything relating to the transaction of the business of that year were kept. . . .

Nothing is called to our attention in this record to justify the removal of plaintiff in error as trustee. If his final reports as executor and as trustee, as they now stand, are correct and show with reasonable certainly that the estate has not lost any money, we do not think the fact, alone, that he has been possibly somewhat careless in his method of keeping the accounts would justify his removal as trustee.

TILLINGHAST v. MERRILL.

(New York Court of Appeals, 1896, 151 N. Y. 135, 45 N. E. 375.)

BARTLETT, J. The defendant Merrill, while supervisor of the town of Stockbridge, in the county of Madison, deposited with a firm of

private bankers to his credit, as supervisor, certain of the public moneys in his hands; the banking firm afterwards failed and the money was totally lost. This action was brought by the county treasurer to recover the money of Merrill and his bondsmen, upon the theory that Merrill on receiving the money became the debtor of the county, and that the deposit of the same was at his own risk.

The trial judge found that Merrill acted in good faith and without negligence in all that he did in the premises.

Under these circumstances the learned counsel for the defendants has urged, with much earnestness and ability, that a supervisor rests under the common-law liability whereby he was bound to exercise good faith and reasonable diligence in the discharge of his duties, and is not responsible for any loss of money which came to his official custody, occurring without fault on his part; that proof of the failure of the banking firm, where he had deposited the money in good faith and without negligence, is a complete defense to this action. . . .

It, therefore, comes to this, that for forty-five years the case of Supervisors v. Dorr (25 Wend. 440) has stood without being directly overruled by any case in this state, and the rule of the limited liability of the common law approved therein by four of our most distinguished judges.

It must be admitted, however, that the weight of authority in the Federal and State courts is in favor of holding officials having the custody of public moneys liable for its loss, although accruing without their fault or negligence. In many of these cases the decision turned upon the construction of the local statute of the official bond, but others squarely decide the question on principles of public policy.

In the case at bar, the defendant Merrill is sought to be held liable for school moneys paid to him by the county treasurer to disburse in payment of the salaries of school teachers upon the orders of the trustees. The statute imposing this duty reads as follows, viz:

"It is the duty of every supervisor,

"1. To disburse the school moneys in his hands applicable to the payment of teachers' wages upon and only upon the written order of a sole trustee, or a majority of the trustees, in favor of qualified teachers. . . ." (2 R. S. (8th ed.) page 1283, section 6.)

By paragraph 8 of the same section a supervisor is required to pay to his successor all school moneys remaining in his hands.

In this statute it will be observed that there are no explicit declarations of the legislative intent, as in the case of town collectors, to create a supervisor the debtor of the county for public moneys in his hands, and the condition of the bond to safely keep, faithfully disburse and justly account for the same does not add to the liability created by statute.

As before intimated, we must consider and decide this question upon general principles and in the light of public policy.

In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.

It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

Without regard to decisions outside of our own jurisdiction we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States Supreme Court, in United States v. Thomas, (15 Wallace, 337) held the surveyor of customs for the port of Nashville, Tennessee, and depositary of public money at that place, not liable when prevented from responding by the act of God or the public enemy.

If that state of facts is hereafter presented to this court it will doubtless be carefully considered whether it does not present a proper exception to the general rule. . . .

The views we have expressed lead to a final judgment against the defendant Merrill as supervisor of the town of Stockbridge, although he is shown by this record to have discharged his official duties in an honorable and faithful manner. . . .

MATTER OF HALL.

(New York Court of Appeals, 1900, 164 N. Y. 196, 58 N. E. 11.)

CULLEN, J. The question in the case is as to the liability of the appellants as trustees for an investment of twenty-five thousand dollars in the debenture stock of "The Umbrella Company." The authority given the appellants by the will is: "I hereby give my said executors and trustees hereinbefore named full power to reinvest the proceeds of such sale or other act as aforesaid in any security real or personal which they may deem for the benefit of my estate and calculated to carry out the intention of this my last will." The testator himself had been in the umbrella business, and by the sixth clause of his will he directed that his interest in the business be closed on the first day of July or the first of January immediately following his decease. The referee acquitted the appellants of any bad faith, but held them liable on the ground that the character of the investment was illegal. This report was confirmed by the surrogate and the surrogate's decree unanimously affirmed by the Appellate Division, which, while it held that under the will the trustees were not limited to what might be called ordinary trust investments, was of opinion that the investment was speculative and hazardous, and therefore, improper. With this view we agree. As there was a unanimous affirmance below, unless we are prepared to decide that good faith exonerates the trustees from liability, no matter how speculative, hazardous or unwise the investment may have been, we must affirm the judgment and cannot look into the evidence to see how speculative or unreasonable the investment was.

The investment in the case at bar was in the preferred stock of a corporation organized to conduct the manufacture and sale of umbrellas, and formed by the consolidation of several firms at the time engaged in that business. The corporation had no real estate or plant. The preferred or debenture stock was issued for merchandise, fix-

tures and book accounts of the firms, while the common stock was issued for the supposed good will of those firms. While the money was not paid on an original suscription of stock, but the stock was bought from a holder, still it was during the very first days of the existence of the company and before experience had shown that it could achieve any success or stability. After doing business for a short time the corporation failed and two-thirds of the investment of twenty-five thousand dollars was lost. One of the firms from the consolidation of which the corporation sprang was that of the appellant Hall, in which firm the testator at the time of his decease was a partner. As pointed out in the opinion delivered by Justice Bartlett in the Appellate Division the testator certainly never inended that the money he had directed to be withdrawn from the business should be invested in the same business.

We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. The trusts of this will are to provide the testator's children with incomes during their lives, and on their deaths the principal it to go to their issue. The very object of the creation of trust, was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty. The range of so-called "legal securities" for the investment of trust funds is so narrow in this state that a testator may well be disposed to grant to his executors or trustees greater liberty in placing the funds of the estate. But such a discretion in the absence of words in the will giving greater authority should not be held to authorize investment of the fund in new speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that a trustee is not limited to the one does not authorize him to invest in the other.

In our judgment the authority given to the appellants by this will is quite similar to that vested in trustees in the New England states, where the strict English rule as to the investment of trust securities which prevails in this state does not obtain. In Mattocks v. Moulton (84 Maine, 545) it was held that in the investment of trust funds the trustee must exercise sound discretion as well as good faith and honest judgment. The court said: "It will be generally conceded that a mere business chance or prospect, however promising, is not a proper place for trust funds. While, of course, all investments, however carefully made, are more or less liable to depreciate and become worthless, experience has shown that certain classes of investments are peculiarly liable to such depreciation and loss. These, of course, would be avoided by every prudent man who is investing his own money with a view to permanency and security rather than the chance of profit. A trustee should, therefore, avoid them, even though he sincerely believes a particular investment of that class to be safe as well as profitable." In Dickinson, appellant (152 Mass. 184), a trustee was held liable for an investment in Union Pacific railroad stock. It was there said: "Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust funds in dividend paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments."

Several of the equitable life tenants consented to the investment made by the trustees and are estopped from questioning its propriety. The courts below have so held and have authorized the trustees to retain the shares of such life tenants in the income produced by the sum which the appellants have been directed to pay into the fund on account of the loss on the securities. The decree, however, does not go far enough in this respect, for in certain contingencies these life tenants may be entitled to share in the principal of the fund. The decree should be modified so as to provide that in case any beneficiary who has assented to the investment in the umbrella stock should become entitled to any part of the principal of the fund paid by the trustees, then the trustees may retain such part, and as so modified affirmed, without costs of this appeal to any party.

McCULLOUGH'S EXECUTORS v. McCULLOUGH.

(New Jersey Court of Chancery, 1888, 44 N. J. Eq. 313, 14 Atl. 642.)

On bill for instructions to trustees. . . .

THE CHANCELLOR. . . . They now ask to be instructed:

First, whether the several trust funds must be kept separately invested, and

Second, whether the investments may be upon mortgages on lands in Minnesota.

It appears by the statement of counsel that one of the *cestuis que trustent* resides in this state, and that all of them reside in states distant from Minnesota.

The first inquiry must, without hesitation, be answered in the affirmative. Each fund is a distinct trust for the benefit of distinct *cestuis que trustent.*

It must be kept separate from all other funds, so that every step in its management may be distinctly traceable in the accounts of the trustees and in the investments they make. The trust must not, through investment, be complicated with the rights of strangers, or required to share in the losses of other funds. 1 Perry on Trusts, § 463; Fowler v. Colt, 10 C. E. Gr. 202; S. C. 12 C. E. Gr. 492.

I am satisfied that the second question should be answered in the negative.

The courts of the state, within which a trustee must account, should hesitate to sanction an investment upon the security of lands that are not within their own jurisdiction, not merely because, in such case, they will be left without the proper facilities to obtain accurate and satisfactory information concerning the investment, but also because they will lose direct control of the fund itself.

Where the trustee is without the jurisdiction, it becomes more important that the fund should be within it, for otherwise the courts may find themselves stripped, not only of power to properly investigate the condition of the trust, but also of power to enforce their decrees.

Again, both the trustee and the *cestui que trust* are interested in the proper investment of the trust fund, the one because of the

duty and responsibility which rest upon him and the confidence that is reposed in him, and the other because of the beneficial value that proper security is to him.

In subserving these respective interests it is incumbent upon both the trustee and the *cestui que trust* to constantly watch the investment of the trust fund and be on the alert to protect it from harm.

To afford opportunity for this watchful care the funds should be invested within the convenient reach of both of these parties.

Judge Finch, of New York court of Appeals, in the case of Ormiston v. Olcott, 84 N. Y. 339, in commenting upon the mischief of permitting a trustee to invest trust funds in another state, says: "It would be unjust to the beneficiaries to compel them to accept such investments, and tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents, and legal remedies would have to be sought under the disadvantage of distance and before different and unfamiliar tribunals."

In the case under consideration the trustees reside and have the trust funds in a state distant from the residences of their cestuis que trustent. The continuance of such a condition of affairs must be condemned. If it remains, the happening of circumstances may readily be imagined that may not only put the beneficiaries of the trust to great annoyance, disadvantage and expense, but also render our courts powerless to do them material service. I cannot overlook the fact that among the numerous and small mortgages that are held by these trustees some may fail, and thereupon questions may arise whether the investments in them were made with requisite care and prudence, and necessitate inquiry into values and other particulars in the locality of the lands mortgaged, in which inquiry the trustees would have the manifest advantage, in a contest with their distant *cestuis que trustent*, of being able to produce evidence from familiar surroundings, at little expense, while their opponents would be obliged to seek for evidence among strangers, in a strange community, and possibly at an expense not at all commensurate with the injury for which they may desire redress. I do not think that the high rates of interest that are obtainable in Minnesota, or the convenience of the trustees, should influence me to disregard the dangers to which the beneficiaries may be

subjected. The fact that the testator made such investments will not justify the trustees in continuing them. His position as owner of the funds in his own right, was vastly different from the position of confidence and responsibility which the trustees occupy. The will gives no express authority for the investments as they are made, and I fail to find such authority, in it, by necessary or reasonable implication.

The trust funds should be brought within this State, and invested here in securities approved by this court.

THAYER v. DEWEY.

(Supreme Court of Massachusetts, 1904, 185 Mass. 68, 69 N. E. 1074.)

KNOWLTON, C. J. The trustees in this case invested more than $200,000 in the purchase of real estate in Chicago, and the question is whether this investment shall be allowed in their account.

The rule in this Commonwealth governing trustees in making investments has often been stated and is well established. They are bound to act in good faith and to exercise a sound discretion. Harvard College v. Amory, 9 Pick. 446; Amory v. Green, 13 Allen, 413; Brown v. French, 125 Mass. 410; Bowker v. Pierce, 130 Mass. 262; Hunt, appellant, 141 Mass. 515; Dickinson, appellant, 152 Mass. 184; Pine v. White, 175 Mass. 585; Green v. Crapo, 181 Mass. 55.

The appellant contends that an investment in real estate outside of the Commonwealth should not be sustained unless, first, the trust funds are so invested when they come into custody of the trustee, in which case he may be justified in retaining the investment; second, the will authorizes or instructs the trustee to make such an investment; third, in certain rare and exceptional cases when such an investment may be necessary or required to protect or secure other investments or interests involved in the trust fund. The rule in some other States is substantially in accordance with this contention. Ormiston v. Olcott, 84 N. Y. 339; Rush's estate, 12 Penn. St. 375, 378; Ex parte Copeland, Rice Eq. (S. C.) 69; McCullough v. McCullough, 17 Stew. (N. J.) 313. But in these States trustees are limited more strictly in their power to make investments than they are limited by our rule in Massachusetts. In Amory v. Green, 13 Allen, 413, trustees were authoriz-

ed to invest in real estate for a homestead for the *cestui que trust* in another State, because the authority given by the will was broad enough to justify it. In many other cases investments in stock and bonds of great corporations organized and doing business in other States have been approved, where it appeared that the investment was made in good faith, and in the exercise of a sound discretion, according to the standard of other men of prudence, discretion and intelligence in the management of their own affairs in regard to the permanent disposition of their funds with a view to probable income as well as the probable safety of the capital to be invested. In these cases the stocks and bonds were such as are often sold, and have a recognized market value, away from the place where the corporation is established or where its property is located.

There is a grave objection to the investment of a trust fund in the purchase of real estate in a foreign State, where the property is beyond the jurisdiction of our courts and is subject to laws different from our own. On this account is would not be within the exercise of a sound discretion to make such an investment without some good reason to justify the choice of it. Ordinarily it is very desirable that investments which have a local character, like the ownership of real estate, should be within the jurisdiction of the court that controls the trust. But in this Commonwealth there is no arbitrary, universal rule that an investment will not be approved if it consists of fixed property in another State.

In the present case it is said that the trust fund is very large, and that this is but a very small part of the whole, and it is expressly found that the investment "will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion." The only objection made at the hearing was that the trustees had no legal right to make an investment in real estate located outside of the Commonwealth. The appellant's contention, if sustained, would call for the establishment of an arbitrary rule which is inconsistent with the general rule as to trustees' investments heretofore existing in this Commonwealth.

Decree of Probate Court affirmed.

IN RE MULHOLLAND'S ESTATE.

(Supreme Court of Pennsylvania, 1896, 175 Pa. 411; 34 Atl. 735.)

Godfrey Fisher was appointed guardian of Nancy Mulholland, minor child of Rudolph Mulholland, by the orphans' court of Center county, January 29, 1885. The proceeds of the estate were paid in to the guardian, in various sums, and at different times between 1885 and 1892. Of the amounts so paid in, the guardian used about $2,200 in the purchase of real estate on his own account. He loaned $3,700 to his son, and $330 to another person. The balance was deposited by the guardian in bank in his own name. He had no other funds in the bank. On July 27, 1894, the guardian filed his account, charging himself with the several sums received for his ward, and with interest thereon at the rate of 3 per cent., which was the amount allowed him by the bank on his deposit. Exceptions were filed on behalf of the ward, claiming that the guardian had failed to charge himself with proper interest. The account was referred to an auditor, who reported, charging the guardian with legal interest on the whole amount. The guardian excepted to the report of the auditor, and, his exceptions being overruled by the orphans' court, the guardian appealed.

The following is the opinion of the court (Archibald, J.) as to the material issue in the case.

"The facts in this case are not disputed. They all appear either by admitted vouchers, or have been drawn out of the accountant's own mouth upon the witness stand. They plainly show that he failed to exercise the care demanded in the management of a trust estate. He not only did not invest the moneys he received in approved real-estate mortgages, or other securities which the law recognizes, but he did not even seek an investment of any such kind. The only loans made were a small one to a man named Brown, and another to this the accountant's son, to put into Western land, both of which ended disastrously. He also used over $2000 to buy land for himself, and deposited the rest in the bank in his own name,—a small portion in the First National Bank of Clearfield, which failed, and the remainder with the private banking firm of Cochran, Payne & McCormick, of Williamsport. While these deposits, strictly speaking, were not min-

gled with his own money, yet they were made in his individual name, and stood, in consequence, at the risk of his personal credit. It cannot be considered, therefore, that they were really kept distinct and separate from his own private funds as the law requires. The truth is that while the accountant, in his own mind, may have individuated the estate of his ward, according to all outward observances he used and disposed of it pretty much as his own. Under the circumstances, he is properly held, not only for the bad investment—if investment it can be called—or that part of it which has been lost, but also for interest upon the whole of it, the same as though he had derived a direct benefit from its use. He practically has had the use of it, and must account accordingly. The case is substantially within the ruling in Copenheffer's Appeal, 3 Penny. 243, and other kindred cases. Both with regard to the general charges of interest, and the reduction of the accountant's compensation. I see no occasion to disturb the findings of the auditor." . . .

PER CURIAM. This record discloses no error of which appellant has any just reason to complain. On the contrary, he appears to have been considerately and leniently dealt with by the learned auditor and the court below. His mismanagement of the trust—using his ward's funds in his own business, and so mingling the same with his own that it was impossible to trace investments, etc.— was such as to require the surcharges of interest, etc., and would also have justified the rejection of his entire claim for commissions; but as to that "the appellee does not complain," and hence the question is not properly before us. There is nothing in either of the specifications of error that requires special notice. The questions involved were sufficiently considered by the court below. . . .

MITCHELL'S ADM'R. v. TROTTER.

(Virginia Court of Appeals, 1850, 7 Gratt. 136.)

This was a suit in equity in the Circuit Court of Brunswick county, by Thomas R. Trotter and wife against Benjamin Wilkinson, administrator of Clement Mitchell deceased, the father of the female plaintiff, for a settlement of his administration account, and for a decree

for the amount which might be ascertained to be due to the plaintiff. . . .

ALLEN, J. The Court is of opinion, that the evidence in the record does not establish such a degree of negligence on the part of the appellant, as to subject him to a personal responsibility for his failure to institute legal proceedings against Robinson Ezell for the debt he, as administrator, had been compelled to pay on account of his intestate having been surety for said Ezell; that on the contrary, the testimony shews that Ezell was unable to pay the debt, and that with a knowledge of the facts established by the evidence, the administrator was not required, in the prudent discharge of his duty, to incur the costs of a suit against Ezell. And as the commissioner, by his special report of the payment and all the testimony bearing on it, submitted the question directly to the Court, whether the claim was properly disallowed, the Court, instead of a partial correction of the report in relation to said claim, should have allowed the administrator credit for the amount thereof. . . .

WATERMAN v. ALDEN.

(Supreme Court of Illinois, 144 Ill. 90, 32 N. E. 972.)

WILKIN, J. . . . That a loss to the complainants has been sustained by reason of the failure of appellees to collect the whole amount of these notes is not denied. That they might have been collected by the use of ordinary business management, and diligence, or secured, is clearly established by the evidence. We think it is equally clear that the trustees knew that said parties were heavily indebted, and liable to fail long before any effort was made by them to secure, or collect said indebtedness. The only finding of the court below on the facts is to that effect. While Special Master Loomis, by his report, excuses the conduct of the trustees, he does not do so on the ground that they were not negligent, but rather upon the theory, that, from the relations existing between the testator and the Marsh's, it is fair to presume that he, if living, would have used no more care and diligence in enforcing those claims than did appellees. It need scarcely be suggested that no such test can properly be applied to the conduct

of trustees. There may be abundant reason for believing that Mr. Waterman, though a careful business man, would much rather have lost the indebtedness than to have pressed the collection of it, but that furnishes no excuse for these trustees to neglect or fail to use all reasonable diligence in the matter. Mr. Waterman might do with his own as he pleased, but the duties of these appellees are fixed by the law, and if they have violated those duties they are personally liable. . . .

BRYANT v. CRAIG.

(Supreme Court of Alabama, 1847, 12 Ala. 354.)

ORMOND, J. The manner in which the account of the guardian was stated, presents the question, whether a guardian who retains his ward's money in his hands, without investing it, is subject to have annual rests made in his account, and charged compound interest.

The general rule applicable to all trustees is, that they should not be permitted to make a profit for themselves, by the employment of the funds in their hands, and if it be invested in trade, or otherwise profitably employed, the cestui que trust may insist on the profit so made, if he elect to do so. No question of that kind is made here, as it does not appear how, or in what manner these funds were employed by the guardian.

But although a trustee may not have invested the trust funds in such a manner, that the profits made by their employment can be ascertained, yet if he suffers the fund to be idle, when the terms of the trust, or the general law, requires it should be invested, so as to yield a profit, he is chargeable with simple interest; or if he is guilty of such gross neglect in the execution of the trust, as to be evidence of a corrupt intention, he may be charged with compound interest. These principles are fully illustrated in many cases, of which the following may be cited as examples: Foster v. Foster, 2 Bro. C. C. 616; Raphael v. Boehm, 11 Vesey, 92; Pocock v. Redington, 5 Id. 794; Dornford v. Dornford, 12 Id. 127; Schieffelin v. Stewart, 1 Johns. Ch. 620 (7 Am. Dec. 507); Clarkson v. De Peyster, 1 Hopk. Ch. 424.

As the guardian could not be guilty of negligence, in not investing the money of his ward, unless the law requires him to invest it, the first question which naturally presents itself is, what is the law upon the subject? Our statute law, though very full and particular, as to the mode of appointing guardians, making settlements with them, &c., is silent upon this particular. It results however, necessarily, from the nature of the trust, that the estate of the ward should be profitably employed, as otherwise it would be consumed, and where it consists of money, this could only be by lending it out on good security. In England, a trustee whose duty it is to invest the money in his hands, is exonerated from liability, by investing it in the public funds, which, as the court would direct to be done on application, it will sanction if done without such application, and he will be exonerated from liability, though the stock should fall in value. Franklin v. Frith, 2 Bro. C. C. 433; Holmes v. Dring, 2 Cox, 1. In Smith v. Smith, 4 Johns. Ch. 445, Chancellor Kent seems to think, that personal security is insufficient, and that a trustee lending money, must require adequate real security, or resort to the public funds. Here are no public funds in which money may be safely and securely invested. At least there has been none until very recently, and it is not probable we shall be long burthened with a public debt.

Personal security, no matter how good it was deemed at the time, would not be sufficient; and it may be added, that with us, real property is subject to such fluctuations, that it is by no means an adequate security; and it may very well be doubted, whether he would not be personally liable, for any loan he may have made of the money, without the sanction of the court, no matter what security he may have taken. Our statute appears to have intended to place this whole matter under the direction of the orphans' court, as it invests that court with power to direct a sale of the land of the ward, if the personal estate, and the rents and profits of the realty, were insufficient for his support; and it appears to follow necessarily, that the same court would have the power to direct in what manner the money of the ward should be invested. It was the duty of the guardian, if he desired to exonerate himself from the payment of interest, to apply to the court for direction in the investment of the funds, who would have examined the proposed security, and whose approbation would have exonerated the guardian from liability, if afterwards lost without his neglect.

The guardian having omitted to make this application, must pay interest on the funds in his hands, whether they have been profitable to him or not, and we next proceed to inquire, whether this is such gross negligence, as will authorize rests to be made in the account, for the purpose of charging him with compound interest.

The general rule undoubtedly is, that where it is the duty of the trustee to invest the trust funds, and he fails to do so, he is chargeable only with simple interest. See the cases already cited, and Newton v. Bennett, 1 Bro. C. C., in the note to which, Mr. Eden has collected all the authorities, establishing conclusively, that for neglect merely, the practice of the court is, to charge interest at the rate of four per centum. Where the trustee is guilty of fraud or corruption, as where, in open violation of the trust, he applies the funds to his own use in trade; converts the property, or securities, as for example, stock, into money, and applies it to his own use; or otherwise corruptly and fraudulently abuses the trust reposed in him; he may be charged with compound interest. . . .

The charge of compound interest, seems to be adopted as a punishment in those cases, where from the gross mismanagement of the trustee, it is difficult, if not impossible to ascertain, what the income of the estate would otherwise have been; but it may be safely asserted, that no estate in money, under the most judicious management, can be made to yield compound interest, at the rate of eight per centum. If it had been annually invested, under the direction of the court, some delay must have been encountered, in finding a person desirous to borrow, and able to give the necessary security. It is not reasonable to presume, that where so lent, it would always be punctually paid, so as to be immediately re-invested; nor can it be doubted, that it would frequently be necessary to coerce payment by suit and that after every precaution had been taken, both principal and interest would occasionally be lost. The charge of compound interest, therefore, is unjust, because the estate could not have yielded that by any prudent management in the hands of the owner, had he been of age to manage it himself.

The mere omission of the guardian, to apply to the court for authority to invest it, and the failure to make annual settlements, are not evidence of fraud, but establish negligence merely, and the court therefore acted correctly in refusing to allow compound interest. . . .

WHITTLESEY v. HUGHES.

(Supreme Court of Missouri, 1866, 39 Mo., 13.)

FAGG, J. . . . It is insisted by the plaintiff in error that Williams could legally convey the estate and transfer the power which had been conferred upon him by the deed of trust. The habendum was "to said trustees and the survivor of them, and to the heirs, executors, administrators and *assigns* of said survivor, in trust," &c. Much stress is laid upon the word *assigns,* and the case of Titby v. Wolstenholme, 7 Beav. 425, is cited as authority to show that a devise made by the surviving trustee of a trust estate was valid, no express power of appointing new trustees being given by the will. From this decision the argument is made in this case that the power to convey by deed, and to make an appointment of a new trustee, must necessarily follow. Let us see the reasoning in the case referred to. The Master of the Rolls said, "we have in this will expressions which clearly show that the testator intended the trusts to be performed by the 'assigns' of the surviving trustee; and in construing the will, we must, if practicable, ascribe a rational and legal effect to every word which it contains. *We cannot consistently with the rules of this court consider the word 'assigns' as meaning the person who may be made such by the spontaneous act of the surviving trustee, to take effect during his life;* but there seems nothing to prevent our considering it as meaning the person who may be made such by devise and bequest; and if we do not consider the word 'assigns' as meaning such persons, it would in this will have no meaning or effect whatever." It is clear that the construction given by the court in that case was because it was absolutely necessary to give any effect or meaning to the will whatever. The doctrine is most clearly enunciated, as it is everywhere else, that the trustee could not while living without an express authority for that purpose, delegate his power to another; and it is difficult to see how it can be relied upon as an authority to support the deed of Williams to the plaintiff. . . .

KATZ v. MILLER.

(Supreme Court of Wisconsin, 1912, 148 Wis. 63; 133 N. W. 1091.)

SIEBECKER, J. . . . The evidence fails to show that Miss Chaffee took any active part in the management of the property, but it shows that in the control and management of this property Bigelow practically did everything required to be done to discharge the obligations imposed by the trust. It is averred that this does not constitute proof authorizing Bigelow to act for Miss Chaffee as such trustee, because his asserted authority cannot be established by such declarations. We do not regard his statements as irrelevant to the inquiry; they bear on the question of his authority to act for her, and should be considered in connection with the other facts and circumstances of the case. It is undisputed that he as trustee did the negotiating for this lease; that he dealt with the plaintiff concerning the assignment thereof to the plaintiff, and conducted all of the transactions, including the reception of the rents due under the lease, practically as sole trustee, for a period of over a year, and that Miss Chaffee at no time throughout this time appeared to take part in or objected to this method of conducting the business in which she was a co-trustee. Her conduct respecting the matter is persuasive as tending to show that she did intrust the entire management of the trust and the control and handling of the trust property to her co-trustee, Bigelow, and tends to support the evidence of Bigelow that she conferred full authority on him to act for and represent her in all these respects. The acts of Bigelow must be held to have had her approval and assent and to be binding on them as trustees in the transactions between them and the plaintiff concerning this lease and the occupancy and use of the trust property. . . .

MARKEL v. PECK.

(Missouri Court of Appeals, 1910, 144 Mo. App. 701; 151 S. W. 772.)

Cox, J.—Action for damages for breach of contract, trial by jury and verdict for plaintiff. . . .

The court, in sustaining the motion for a new trial in this case, recited that it was by reason of the error of the court in giving instruction number one on behalf of plaintiff. This instruction told the jury that if they should believe from the evidence that on or about said 6th day of March, 1903, said trustees, defendants herein, or a majority of them, authorized Stephen Peck & Bro. to execute the contract for lease, read in evidence, and that said Stephen Peck and Bro. did execute such contract, and that plaintiff had fully performed, or offered to perform, its conditions upon his part, and that the defendants, or a majority of them, had refused to perform the same in accordance with the terms thereof, then the verdict should be for the plaintiff, and unless they should so find the facts, the verdict should be for defendants. Appellant insists that this instruction was correct under the evidence, and that the verdict was for the right party, while respondents insist that the instruction was wrong for the reason that the defendants as trustees had no power to delegate their authority, and, for that reason, could not appoint an agent to execute a contract, and further that the authority of the agent, if permissible at all, must be in writing, and that a trustee, either by himself or an agent could not execute a lease to begin in futuro.

The first proposition that confronts us in this investigation is as to whether or not those defendants, trustees under the will of Charles H. Peck, invested with the power to manage and control the estate committed to their charge, and to execute leases thereon, could delegate that power by appointing an agent to attend to that matter for them.

The general rule is that a trustee of an express trust, invested with powers, the execution of which calls for the exercise of discretion and judgment on the part of the trustee, cannot delegate such powers to any one, and, hence, the performance of any act, requiring the exercise of discretion, must be done by the trustee himself and cannot be delegated to an agent. (1 Perry on Trusts, 402; Graham v. King, 50 Mo. 22; Bales v. Berry, 51 Mo. 449; Polliham v. Revely, 181 Mo. 622, 81 S. W. 182.)

The office of trustee is one of personal confidence and cannot be delegated. The reason of the rule lies in the fact that the grantor who creates a trust and invests the trustee with powers, calling for the exercise of discretion on the part of the trustee in their execution,

selects the trustee by reason of his confidence in the integrity and good judgment of the trustee, and when the trustee accepts the trust, he does so with the implied understanding that he will discharge the duties incumbent upon him, by reason of the trust, according to his own best judgment, and, hence, unless the grantor expressly provides that the trustee may delegate the powers conferred, he cannot do so. He may delegate authority to perform a purely ministerial act; that is, an act not requiring the exercise of discretion, for this is not a delegation of the trust. "The trustee must, at times, act through attorneys or agents, and, if he determines in his own mind how to exercise the discretion and appoints agents or instruments to carry out his determination, he cannot be said to delegate the trust, even though deeds or other instruments are signed by attorneys in his name." (Perry on Trusts, sec. 409.)

It has been uniformly held in this State that trustees, appointed in a deed of trust, to make sale of land conveyed therein, cannot delegate the power to make the sale, and the reason assigned is well stated by Wagner, Judge, in Graham v. King, 50 Mo. 22, as follows:—"The office and duties of a trustee are matters of personal confidence, and he must exercise a just and fair discretion in doing whatever is right for the best interest of the debtor. He must in person supervise and watch over the sale, and adjourn it if necessary, to prevent a sacrifice of the property, and no one can do it in his stead unless empowered thereto in the instrument conferring the trust. A trustee cannot delegate the trust or power of sale to a third person, and a sale executed by such delegated agent is void."

If this rule should prevail in the matter of a sale of land for the purpose of collecting a debt, under a power granted in a deed of trust, in which the duty of the trustee, in executing the trust, is specifically provided, it should, for a much stronger reason, apply to a trustee charged with the management of a large estate for a long term of years which necessarily requires the constant exercise of vigilance and discretion.

In this case, the will under which these trustees were acting made no provision whatever for a delegation, by them, of any of the powers conferred upon them under the will, and our conclusion is that they possessed no power to appoint an agent, either verbally or by writing, and shift to the agent the performance of any duty requiring the

exercise of any discretion upon their part; and as the execution of a contract, such as the one sued upon in this case, necessarily called for the exercise of some discretion and judgment, it could not be executed in a way to bind the estate or these defendants in their capacity as trustees, by any agent which they might appoint. True, they might, if they had agreed upon the contract themselves, settled its terms and agreed upon every question requiring the exercise of discretion or judgment, delegate to an agent the naked power to sign the contract, but that is not this case. The evidence in this case wholly fails to show that the trustees made this contract. The contract purports upon its face to have been executed by an agent of these defendants, and plaintiff tried his case upon that theory. . . . .